CHAPTER 1

Introduction

'Jurisprudence was the first of the social sciences to be born', said Wurzel[1]. Its province has been determined and re-determined because the nature of the subject is such that no delineation of its scope can be regarded as final. On torts or contracts, for example, a student may be recommended to read any of the standard textbooks with the assurance that, whichever book he does read, he will derive much the same idea as to what the subject is about. With jurisprudence this is not so. Books called 'jurisprudence' vary so widely in subject matter and treatment that the answer to the question, what is 'jurisprudence'?, is that it means pretty much whatever anyone wants it to mean—a depressing start indeed. This kind of answer suggests that something is amiss with the question. It would be better to ask: How is this word used?, or more pertinently, What is this book going to do?

Use of the word 'jurisprudence'

The Latin expression, *juris prudentia*, means either 'knowledge of' or 'skill in law'. The Roman jurists, however, never developed any such subject as '*jurisprudentia*'[2]. In the sense of 'knowledge of law', the word sometimes describes expositions of particular branches of the law, eg the name 'Equity Jurisprudence' was once given to a textbook on Equity[3]. This use of the word, current on the Continent, is no longer fashionable in common law countries. In a wide sense 'jurisprudence' is used also to describe the legal connections of any body of knowledge: so 'Dental Jurisprudence', 'Architectural Jurisprudence' or 'Medical Jurisprudence' would be titles for expositions of such aspects of dentistry, architecture or medicine as may be important in law. Some criticisms of this use of the term are somewhat misconceived. There has been a tendency to suppose that the word 'jurisprudence' has, or should have, some 'proper' meaning, which makes it inapplicable to this kind of study[4]. As will appear, no word, least of all 'jurisprudence', has a 'proper' meaning. There is also the argument that such studies as these are not 'scientific'[5], which presupposes some special meaning of the word 'science'. The reason for avoiding a term like 'medical jurisprudence' is that this kind of expression is no longer current in English-speaking countries, although occasional instances may still be found[6]. It may be noted

1 Wurzel 'Methods of Juridical Thinking' in *Science of Legal Method: Select Essays*, p 289.

2 Ulpian's remark in the *Digest*, quoted in the opening of Justinian's *Institutes*, '*Juris prudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia*' (D 1.1.10.2; *Inst* 1.1.1: jurisprudence is the concept of things divine and human, knowledge of the just and the unjust), was only a piece of rhetoric not pursued by the Romans.

3 Ames *Equity Jurisprudence*. See the comments of Stone *The Province and Function of Law* p 26.

4 Holland *Jurisprudence* p 4, n 4.

5 Gray *The Nature and Sources of the Law* pp 134, 147.

6 The term 'medico-legal jurisprudence' has largely been superseded by '[illegible]'

that in French law *la jurisprudence* is the term applied to the body of law built up by the decisions of particular courts[7].

In England it was not until the time of Bentham and his disciple Austin in the early part of the nineteenth century that the word began to acquire a technical significance among English lawyers[8]. The former distinguished between examination of the law as it is and as it ought to be ('expositorial' and 'censorial' jurisprudence), and he was also much concerned with law reform ('deontology'). The latter, who was the first Professor of Jurisprudence in the University of London, occupied himself with 'expository' jurisprudence, and his work consisted mainly of a formal analysis of the structure of English law. Analytical exposition of the type which Bentham pioneered, and Austin developed, has dominated English legal thought almost to the present. It was therefore inevitable that the word 'jurisprudence' came to mean in this country almost exclusively the analysis of the formal structure of law and its concepts. This was the nearest that the word came to bearing a precise meaning.

Towards the end of the nineteenth century changing human affairs had brought about an ever-increasing preoccupation with conflicting ideologies and troubled social conditions, which resulted in a decisive shift in outlook with the result that jurisprudence came to be envisaged in a broader sense than in Austin's day. Buckland described the change vividly. 'The analysis of legal concepts', he said[9], 'is what jurisprudence meant for the student in the days of my youth. In fact it meant Austin. He was a religion; today he seems to be regarded rather as a disease'. The breadth of the modern attitude is well summed up by Julius Stone who described jurisprudence as:

> 'The lawyer's extraversion. It is the lawyer's examination of the precepts, ideals, and techniques of the law in the light derived from present knowledge in disciplines other than the law'[10].

So vast a coverage may be summed up in the proposition that jurisprudential study nowadays concerns thought about law, its nature, function and functioning, on the broadest possible basis, and about its adaptation, improvement and reform. A convenient way of obtaining an idea of its compass is by explaining this description.

Thought about law

Writings on jurisprudence are not concerned with expositions *of* law, but with disquisitions *about* law[11]. Various branches of substantive law, for example, teach how rights and duties are acquired, whereas jurisprudence would investigate such questions as: What are rights and duties? How are they used? How do they work? It also improves the use of law by drawing together insights from different branches, criminal, constitutional etc, in the solution of problems. Thought about law is also a story of movements in outlook and ever-changing ideas, and developments are taking place in contemporary physical, moral and other social sciences, which make it difficult to decide once and for all how, if at all, these should be taken into account.

7 The equivalent of 'jurisprudence' in its Anglo-American sense is *Théorie générale du droit.*
8 For their work, see ch 16 post.
9 Buckland *Some Reflections on Jurisprudence* p 2.
10 Stone *Legal System and Lawyers' Reasonings* p 16.
11 King 'Propositions about Law' (1951) 11 CLJ 31.

'Thought about law' suggests that an important, if not essential, prelude to jurisprudential study should be some thought about thought. The overall aim is not to teach students what they need to know, but how to think profitably and for themselves, as well as to educate and equip them to be efficient lawyers. Thinking is inseparably bound up with the meaning and use of words. This is an aspect of philosophy, known as semantics, which is of especial interest to lawyers since, as Lord Macmillan said, 'The lawyer's business is with words. They are the raw material of his craft'[12]. Laws are articulated in language; logic is controlled by it. Some of the needless difficulties that have arisen in jurisprudence are of linguistic origin. This is because words are not only tools of thought, but also control it; people tend to think in terms of their language structure. Accordingly, learning how to think profitably will be assisted by a sharpened awareness of the possibilities of language, not only to lead thought but also to mislead it[13].

Linguistic precepts

In the first place, the idea that a word must necessarily possess some unique or 'proper' meaning should be abandoned. An explanation of this lies at the basis of a biological theory, known as 'autopoiesis', put forward by Professor Maturana, that no one can 'know' what the world outside him or her 'really' is, for what each person 'knows' is the response of his or her nervous system to external stimuli[14]. This is not a denial of objective reality, but an assertion that no one can ever know what this is outside his or her neuronal response to it. Perception is thus a matter of personal interpretation. Equally, the meaning of a word depends on individual past experience of the contexts in which it is used, its applications as well as its non-applications. Another reason for rejecting 'proper' meanings is that the same 'thing' may be referred to by different words for different purposes, eg the same act may be called trespass to goods or theft or malicious damage in different contexts. The meaning of a word also depends upon how it is used in the context, so its function in the proposition as a whole should be considered[15]. The sense is often lost as soon as one attempts to elucidate the thing referred to, ie the referent. For instance, in the statement 'England expects every man to do his duty', it is useless to elucidate 'England' by reducing it to its referents. The sense here depends, not on the thing or things referred to, but on the function which the word performs in that sentence. The nuances of meaning imparted by context can be illustrated by taking a question and answer by, say, a husband and wife, 'where are you?' and her reply, 'I am here'. If this answer is understood referentially, it is unhelpful, for at the moment of speaking she could only be 'here' on that spot. However, against the background of her husband's knowledge of the geography of the house and the direction from which her voice comes, the answer could mean 'I am in the

12 Macmillan *Law and Other Things* p 31.

13 For a different statement of methodological and other errors, see Summers 'Legal Philosophy Today—an Introduction' in *Essays in Legal Philosophy* (ed Summers) pp 7 et seq.

14 See *Autopoiesis, Communication and Society* (a symposium, edited by Benseler, Hejl and Köck) in which there are papers by Maturana and others and references.

15 'The meaning of a word is its use in the language': Wittgenstein *Philosophical Investigations* p 43. For an application of this technique to the elucidation of legal terms, see Hart 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37, especially his elucidation of 'right' at 49. For criticism, see Auerbach 'On Professor Hart's Definition and Theory in Jurisprudence' (1956) 9 Journal of Legal Education 39.

drawing room', or kitchen etc. If she were to announce 'I am here' as soon as she enters the front door after shopping, the function of the statement is not to indicate where she is (her husband knows that), but the completion of the shopping activity and her return. If the baby wakes up crying and she says 'I am here', the function is not to indicate location or completion of an activity, but reassurance mother is at hand. Similarly, it is futile to elucidate the meaning of 'jurisprudence' by applying reductive analysis; it needs to be understood in the light of how it is used. All this does not deny that words are frequently used to refer to 'things'. Thus, a word may refer to a particular phenomenon as perceived by the user, eg the 'Mona Lisa'; or a class of things, eg 'pencil'; or an inference from a totality of factors, eg 'negligence'.

Secondly, if meaning and experience rest on individual interpretation, it follows that concerted activities can only take place within areas of similar interpretations, 'consensual domains'. It is in such areas that law, morals, ethics etc operate. Likewise, communication takes place within the consensual domain of the 'usual' meaning of words. It is generally accepted that words have an inner 'core' of settled applications surrounded by a 'fringe' of unsettled applications. Problems of interpretation arise in this 'fringe' area. Words may also have more than one usual meaning, in which case the context has to resolve which meaning is being considered, eg 'race', 'capital'. As will be seen later, words such as 'person', 'possession' and even such common legal terms as 'right' and 'duty' are of this type. An American judge has remarked that 'a good deal of warfare has its origin in the confusion that arises when a single term of broad and ill-defined content is made to do duty for two or more ideas'[16]. When a word has undergone shifts in meaning in this way, it is fruitless to speculate about the 'essence' that underlies the shifts; each shift should be elucidated on its own. Equally pointless would it be to condemn one or other application as 'improper'.

Thirdly, however useful it may be in the elucidation of words, especially abstract words, to ask how they are used, this should not imply that reductive analysis is totally valueless. In a good many kinds of discourse it will prove most helpful to identify as closely as possible the 'things' that are being referred to. This may conveniently be done with the aid of such questions as Who? What? When? Where? For instance, people argue at length about 'the class struggle', but discussion of this only becomes meaningful when it is reduced to a less abstract level. There have been many 'class struggles': who? about what? when? where? Corbin evinced a keen appreciation of the point when he said:

> 'It helps us to realize that acts are always individual; that pain and pleasure, emotions and desires, are always individual; that rules of law are made for individuals and that human and social welfare is, in the last analysis, always individual welfare. Labour is not in conflict with capital; but a labourer with no capital may fight a labourer with capital. "Interests of personality" do not conflict with "interests of property", because only *persons* have interests either factual or jural.... A state, a corporation, a group, a union, can act and can be affected only through individuals. Societal evolution can take place only by the evolution of individuals. Socialism is always some form of individualism, some combination of individual relations'[17].

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16 Cardozo *The Growth of the Law* p 30.

17 Corbin 'Jural Relations and their Classification' (1920-21) 30 Yale LJ at p 227 n 2.

Because reductive analysis will not succeed with *all* statements (eg 'England expects every man to do his duty'), it is wrong to imagine that it cannot apply usefully to *some* statements. The method is unquestionably an aid to precision and a valuable corrective to sloppy thinking in terms of slogans. The two methods of elucidation, the functional and reductive, are not mutually exclusive; both are helpful.

Fourthly, some words carry an emotive element which lends illegitimate weight to a statement. Words like 'science', 'law', 'right', are heavily loaded in this way. Indeed, the word 'jurisprudence' is itself an 'imposing quadrisyllable', which, it has been said, 'is constantly introduced into a phrase on grounds of euphony alone'[18].

Fifthly, language has different functions. The most usual is communication, which requires a speaker or writer, a medium of communication and a listener or reader. Each party has a part to play. The speaker or writer should so choose a term that it is likely to be interpreted in the way he wants[19]. 'When I use a word, it means just what I choose it to mean, neither more nor less'[20] is a cavalier and unhelpful attitude unless the author clearly indicates beforehand the special meaning that he attaches to the word. The listener or reader should do his best to understand the word in the intended sense[1], and in this respect the great lesson is that of restraint in criticism. No one should criticise another for something he did not mean. Having understood, it may be proper to point out that his language is misleading, or that what he says is misconceived, or that he does not go far enough; and if indeed he is obscure, suggestions might even be made as to what he might have meant. Subject to this, it is always necessary, as Julius Stone remarked, to 'speak as faithfully as we can *with his voice before we chide him with ours*'[2].

Apart from communication, language is also used performatively, ie to accomplish results[3]. For example, the utterance 'I pronounce you man and wife', is not a communication or a report. It does not state the fact that a couple *are* man and wife, but that they *are to be* man and wife; it constitutes a new state of affairs. This function is closely connected with institutions and procedures. Thus, it is only a clergyman acting officially who can effectively pronounce two persons to be man and wife.

Sixthly, generalisation beyond the field of study should be made with care. As will appear later, some theories of law, though providing valuable insights, are spoiled by over-generalisation.

Seventhly, 'facts' should be distinguished from 'statements of facts'. Some non-verbal thing or event can be the basis of different statements of fact at varying levels of generality. For example, A drove his Rolls Royce car at 30 mph at 2 pm last Wednesday through Piccadilly Circus, knocked down B and broke his right leg. Assuming that this event occurred, the above would be a statement of those facts. It is possible, however, to restate them at a higher level of abstraction thus: a person drove a vehicle negligently on the

18 Holland *The Elements of Jurisprudence* p 4.

19 For a failure to communicate, see *J McGrath Motors (Canberra) Pty v Applebee* (1964) 110 CLR 656.

20 Humpty Dumpty in *Alice Through the Looking Glass* ch 6. For a judicial comment, see Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 245, [1941] 3 All ER 338 at 361.

1 Cf Lord Reid's protest in *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793 at 813, [1971] 1 All ER 150 at 164.

2 Stone *Legal System and Lawyers' Reasonings* p 2.

3 JL Austin *How to Do Things with Words.*

highway and inflicted physical injury on another person. At still higher levels of abstractness the following statements might be made: inflicting physical damage negligently on another; or, inflicting damage negligently on another; or, inflicting damage on another. In trial courts 'establishing facts by evidence' is to make statements at the lowest possible, or at least a very low, level of generality; but the concern of lawyers is not confined to this. As will be seen in Chapter 7, the possibility of formulating different statements of fact based on the same event is a clue to understanding the *ratio decidendi*, or principle, of a judicial decision. It also explains how an appellate court, while accepting the findings of the trial court, may nevertheless substitute a different opinion of them[4].

Finally, in so far as statements are capable of being checked at all, they may be checked with a view to establishing either their truth-value (verification) or their admissibility for consideration[5]. It is obvious that the criterion of checking has to lie outside the statement which is being checked, and that this criterion should never be twisted to suit the statement. Some statements may be both checked and verified, eg that a man named A drove his Rolls Royce car at 30 mph at 2 pm last Wednesday through Piccadilly Circus and ran into and injured a man named B. The statement, eg that A drove his car negligently, cannot be verified, since 'negligence' is an inference and a matter of opinion. It may, however, still be checked in order to see whether it is an admissible 'statement of fact' based on that occurrence; which it clearly is. By contrast, the statement that A caused a flood in Piccadilly Circus at 2 pm last Wednesday is inadmissible. It is evident, therefore, that the range of possible statements of fact, though wide, is not unlimited, and that there is a point beyond which they cannot go. With regard to law, propositions of law are incapable of being checked, proved or disproved, eg you ought not to steal. Propositions *about* law, on the other hand, may or may not be checkable. Thus, the statement that judges use the proposition, 'You ought not to steal', in deciding a certain type of case may be checked and verified; but neither the statement that the payment of £50 for pulling the communication cord in a train without cause is a penalty, nor the statement that such payment is only a tax on the indulgence of this pleasure[6] is capable of verification. Both are admissible; which is to be preferred has to be determined with reference to their respective utility for lawyers, and this depends on conformity with the whole background of legal doctrine and way of thinking.

In addition to these linguistic preliminaries, another aspect of thought concerns the methods of reasoning that are used and on which any discipline depends. Gray once said 'The real relation of Jurisprudence to Law depends not upon *what* Law is treated, but *how* Law is treated'[7]. Relationships, however, are seen only by the mind and Gray's use of the word 'real' is a slightly tendentious utilisation of its emotive loading. Had he spoken of the relationship which appealed to him there would be no objection. It would have been

4 Eg *Benmax v Austin Motor Co Ltd* [1955] AC 370, [1955] 1 All ER 326; *Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 1 All ER 582; *The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709.

5 See generally Waismann 'Verifiability' in *Logic and Language I* (ed Flew) ch 7 (reprinted from *Proceedings of the Aristotelian Society* Supplement 1945). Cf Popper's test of 'falsifiability': *Poverty of Historicism*. Is the statement 'Black ravens exist' falsifiable? If not, has it no meaning?

6 Holmes 'The Path of the Law' in *Collected Papers* p 173, and see p 449 post.

better had he said that this relation depends *not so much* upon what law is treated, but how it is treated, for obviously there must be some material for treatment. The main idea, however, is acceptable.

One method of treating the subject might be called the method of logical analysis which is *a priori* and demonstrative, ie breaking down a given hypothesis into its components and implications. Alternatively, there is what may be called the method of synthesis, which is constructive and empirical, ie unifying the data into a coherent whole. There is no question of one being more correct than the other, or indeed of their being kept sharply distinct. They are both useful as well as interdependent. The only point is which of them should predominate; which is a matter of preference.

The method of logical analysis starts with a given concept as embodied in a definition and proceeds to unfold its implications. The pattern into which the material falls is implicit in the definition. The chief points are:

(a) The power and penetration of the demonstration depends on the organising power of the concept.
(b) Definition is always an abstraction, that is, it is selective and does not include everything. It thus represents a model, an approximation, or a hypothetical framework[8].
(c) Emphasis is laid on the logical implications of the premise, that is, on the validity of the inference rather than on its truth-value or desirability. *A priorists* tend, as a rule, to scorn empiricism.
(d) A new concept may well be thought-provoking and offer some new way of looking at the subject.
(e) It may have persuasive force and ultimately mould practice.
(f) Logical thinking is a valuable mental training.

This method is not so much a training in thinking for oneself as thinking along a line determined by another. It may well happen that a particular way of looking at law will lead to one answer only of a problem which might with equal plausibility be resolved in some other way. It is important that each person should be left to decide such a point for himself. As Pollock once put it: 'A definition has no business to prejudge the question how far that is the case'[9]. For example, a much disputed question is whether international law is 'law'. Austin, who thought of 'law' as the sum-total of laws and defined 'a law' as the command of a sovereign supported by sanction, logically refused to apply the word 'law' to international law[10]. No harm is done as long as it is realised that this is only the logical result of *his* use of the word 'law'. What is important is that each should decide for himself and not blindly follow in the footsteps of Austin. There are many ways of defining 'law', some of which would include international law.

Secondly, logical manipulation will only reveal what has been put into a premise. The interesting part is the analysis on which it is based. Definitions, said Julius Stone, are 'essentially mnemonics for clarification. They may be preambulatory mnemonics foreshadowing elucidation to follow, or summation mnemonics recalling what has already been expounded. In either case "definition" cannot fruitfully be more definite nor more definitive than

8 Cf Stone *Legal System and Lawyers' Reasonings* pp 53, 55, and generally ch 5.
9 Pollock *A First Book of Jurisprudence* p 29.
10 See ch 22, post.

the exposition which it calls to mind'[11]. What is important is to know why certain ideas and not others were chosen and linked as they are in a definition[12].

Thirdly, obsession with a particular definition is misplaced, for there is no one proper or even supremely useful definition. Different definitions are useful for different purposes and for looking at the subject matter from different points of view[13]. Thus, definitions of law with reference to structure or function or development are all useful; and a definition may reflect the point of view of a legislator, judge, practitioner, jurist, sociologist, moralist or wrongdoer.

Fourthly, every definition is only an approximation to the detail of its subject matter. It is thus useful as a pointer to it and as clarifying the proposed use of a term by the definer. A lawyer will find a definition valuable if its logical implications correspond with the actual ways in which judges and lawyers think and act in deciding disputes. Insofar as the logical analysis of a definition fails to correspond in this way, it is misleading. 'The first call of a theory of law', said Holmes J, 'is that it should fit the facts'[14]. Not all the implications of a definition of 'law' have ever corresponded with the actual language and behaviour of lawyers because, to quote Holmes J again, 'The life of the law has not been logic: it has been experience'[15]. The result is that the method of logical analysis has tended to produce a cleavage between 'jurisprudential thinking' and 'lawyers' thinking', which is unfortunate since efforts should be made towards bridging the gulf that regrettably exists between jurisprudents and practitioners[16].

Fifthly, as to the thought-provoking and persuasive force of definitions, it is submitted that while there is some truth in this, it can be over-estimated. The thought-provoking potentialities have hitherto consisted mostly in evoking critical responses, while the persuasive possibilities would require an unattainable measure of agreement among jurists before there can be any hope of practical achievement[17]. 'In fact', said Sir Ivor Jennings, 'the task which many writers on jurisprudence attempt to fulfil in defining law is a futile one'[18]. Besides, laws develop according to needs, not the logical implications of definitions.

Finally, while nothing should be allowed to impair the value of deductive analysis as a mental discipline, it has to be pointed out that it is not the only one. The alternative constructive or empirical method of synthesis is no less worthy a discipline, about which something must now be said.

This is concerned with the evolution of a concept. Before its logical implications can be worked out, it must have been evolved in some way, which suggests that the constructive process has to precede the demonstrative.

11 Stone *Legal System and Lawyers' Reasonings* p 184; and earlier Dias 'The Mechanism of Definition as Applied to International Law' [1954] CLJ at 218-219.

12 As Kantorowicz explains throughout his book *The Definition of Law*.

13 For an amusing example of the definer and definee being at cross purposes, see Buckland *A Manual of Roman Private Law* p xii.

14 Holmes *The Common Law* p 211. See also Stone *Legal System and Lawyers' Reasonings* p 58.

15 *Holmes* p 1.

16 Cf Dicey: 'Jurisprudence is a word which stinks in the nostrils of the practising barrister', quoted in Gray *The Nature and Sources of the Law* p 2.

17 Stone *Legal System and Lawyers' Reasonings* pp 167 et seq, for reasons why no definition is likely to win wide acceptance.

18 'The Institutional Theory' in *Modern Theories of Law* (ed Jennings) p 83; *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 159.

> 'The definition of a concept must precede, not the investigation of the question, but its presentation, if you wish to avoid discussing alien objects under the cover of an ambiguous word'[19].

The statement expresses the point that every definition is the product of some prior investigation.

The greater part of this book will be concerned with the kind of analysis that could serve as the prelude to the formulation of refined and elaborate definitions rather than with any particular definition. Where, then, should such a study begin? The prior investigation, which precedes the formulation of a definition, requires that the material to be examined should first be identified in some rough, provisional way. The constructive method, therefore, does not claim to dispense with all preconceptions. The point is that these should be both minimal and provisional. The matter was well put as follows:

> 'While it is true that all observation is in terms of a conceptual scheme, this does not mean that one must have a fully worked out theory in order to do any observation at all'[20].

After the material has been identified, the study may proceed in any direction and progress can be achieved by formulating tentative hypotheses, the logical implications of which may be checked as to accuracy and admissibility, as explained earlier. A 'hypothesis' here means a provisional theory or basis of explanation. No hypothesis can be evolved out of nothing. It presupposes prior knowledge of the problem presented by the material; the deeper the knowledge, the more fruitful the hypothesis. Huntingdon Cairns explained it as follows:

> 'The general pattern of the inventive process as it has been developed by psychological experiment and analysis is, first, awareness of a need, second, reflection upon the need, third, a sudden illumination, and, finally, painstaking efforts to perfect the insight. All the steps appear essential, but none more so than the demand for previous acquaintance with the subject matter'[1].

Consistently with the foregoing, two kinds of definitions can be distinguished. The first consists of those which merely identify the material for the purpose of examination. The second consists of those which organise the completed study and precede the logical unfolding of the patterns implicit in them, in short, they indicate the sense which the definers impose on their terminology. The latter are more refined than the former, and reflect the purposes and points of view of the definers. Definitions of both types are found in Kantorowicz's book, *The Definition of Law*, in which he begins with a rough definition, as he says, 'provisionally and with intentional vagueness, as an example of what will be in our minds when speaking of law before arriving at a formal definition'; and he then proceeds to refine it into a final definition at the end[2].

A convenient starting point would be to identify legal material by taking

19 Kantorowicz and Patterson 'Legal Science—a Summary of its Methodology' (1928) 28 Columbia Law Review 679 at 681n.

20 Sheldon 'Some Observations on Theory in Social Science' in *Towards a General Theory of Action* (eds Parsons and Shils) 36.

1 Cairns *The Theory of Legal Science* 58, 130; cf M R Cohen 'Law and the Scientific Method' in *Jurisprudence in Action*, p 125.

2 Kantorowicz *The Definition of Law* pp 12, 79.

the applications of the word 'law' by courts. Professor Olivecrona adopts a similar approach. 'The study cannot begin with a definition of law', he says:

> 'It is impossible to start from a definition since this would mean a *petitio principii*. Before a definition can be reached, the facts must be analysed. The method will be simply to take up such facts as are covered by the expression rules of law. No assumption is made from the beginning concerning their nature. We only use the word "law" so to say as a stick to point to the object of the investigation'[3].

An idea such as this is not precise, but it serves as a provisional means of identifying legal material. Mere identification gives no indication of its nature and prejudges no issues. It only furnishes a starting point with minimal preconceptions and is, above all, provisional and open to refinement. It will certainly bring in the 'core' of agreed applications of the word 'law' without prejudice to 'fringe' meanings, eg international law[4].

The courts have been selected as the focal point because they are observable facts and because much of a lawyer's business centres on them[5]. Whatever the angle of vision, they remain an inescapable landmark. Legislators, jurists and villains are all concerned with them in different ways, whether in trying to control, explain or circumvent their probable reactions. As Professor Cross has observed, this 'is an excellent point of departure for a discussion of the major problems of analytical jurisprudence'[6]. An objection might be advanced that some 'law' must have established courts in the first place, which would prevent 'legal material' being identified as what courts accept. The answer is that this only indicates that in the very beginning a different means of identifying 'legal material' would have been required; it does not prevent it from being so identified *now*.

The courts of every country accept some medium, or media, as capable of imparting the quality of 'law' to propositions. The usual designation for such medium is 'criterion (criteria) of validity' because if a proposition has filtered through it, then it is a valid proposition of law; if it has not done so, it is not a valid proposition of law[7]. In Great Britain the label 'English law' is

3 Olivecrona *Law as Fact* (1939) pp 25-26; elaborated in the second edn (1971) pp 1-5, 84-85. Cf Lawson *The Rational Strength of English Law* p 7. It is also to be noted that nowhere in Stone's original treatise, *The Province and Function of Law*, was there a definition of 'law', and after nearly twenty years of reflection he still did not see the need for one: *Legal System and Lawyers' Reasonings*, pp 184-185. So, too, Jennings 'The Institutional Theory' in *Modern Theories of Law* (ed Jennings) p 83.

4 Some argue that a definition of 'a law' should follow on a concept of 'legal system', eg Raz *The Concept of a Legal System* p 2. Perhaps so, but to identify material for study is not to define 'a law'.

5 'Law is basic to orderly society and courts are basic to law': per Salahuddin Ahmed J, in *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 267. For a discussion of 'court' and 'judicial office', see *United Engineering Workers Union v Devanayagam* [1968] AC 356, [1967] 2 All ER 367.

6 Cross *Precedent in English Law* p 151. See also Raz 'The Institutional Nature of Law' (1975) 38 MLR 489.

7 In Roman law, for example, the remuneration, *honorarium*, for services rendered under a contract of mandate was never embodied in any of the law-constitutive media of that system, which is why mandate remained theoretically gratuitous, the *honorarium* being 'extra-legal' and recoverable by procedure *extra ordinem*.

regulated by legislation[8], judicial precedents[9], immemorial customs[10] and after Britain's accession to the European Economic Community its Regulations and Decisions. A caution has to be observed here. The mere fact that a proposition is embodied, or even applied, in a judgment does not *ipso facto* make it 'law'; it has to be enunciated and applied as such. Thus, judges constantly employ rules of arithmetic, but these do not thereby become 'English law' since they are not being applied as such[11].

The expression 'source of law' is sometimes used in this connection. 'Source' has more than one meaning. It may refer to the source of information of a rule (eg a textbook), or the origin of the material content of a rule, or the formal stamp of authority as 'law'. It is the last sense which is relevant in identifying legal material. Failure to bear the distinctions in mind, especially between the second and third meanings, introduces an element of confusion[12].

Discussion of thinking processes would be incomplete without allusion to the special kinds of reasoning involved in the judicial process. In addition to

8 'What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal': per Ungoed-Thomas J in *Cheney v Conn* [1968] 1 All ER 779 at 782. It might be remarked that some natural lawyers would disagree, for they would want the courts to add the moral quality of the content to the mere fact of enactment as the criterion of validity. This will be discussed later in ch 4 and at pp 500-501. Further, statutes do not become 'law' only when judges apply them; they are applied because they are 'law' on enactment; cf Gray *The Nature and Sources of the Law* pp 125, 170-172, and pp 449, 452-453 post.

9 Cardozo CJ referred to precedent as 'the process by which forms of conduct are stamped in the judicial mint as law, and thereafter circulate freely as part of the coinage of the realm': *The Growth of the Law* p 32. See also M R Cohen: 'It is only when courts, balancing considerations of justice and policy, decide to enforce a moral or political rule that they transform it into a legal rule': 'The Process of Judicial Legislation' (1914) 48 Am LR at 170. As an example may be cited the duty of care towards rescuers, which was a rule of American law summarised by Professor Goodhart as a correct statement of what should also be English law, but which only became a rule of English law when the Court of Appeal adopted Goodhart's statement: *Haynes v Harwood* [1935] 1 KB 146 at 157.

10 By convention the writings of certain ancient jurists, the latest of whom is probably Foster, 1762, can also be quoted as 'English law', but only as 'law' at their respective periods. Lord Denning MR once remarked that in certain types of matters 'the opinion and practice of the profession certainly makes law': *R v Industrial Injuries Comr, ex p Amalgamated Engineering Union* [1966] 2 QB 21 at 28, [1966] 1 All ER 97 at 99. This should not be understood literally, but as referring only to a rule of practice.

11 Eg in *Askinex Ltd v Green* [1969] 1 QB 272 at 285, [1967] 1 All ER 65 at 71, Lord Denning MR added an appendix to his judgment working out the calculations involved in terms of mathematical formulae.

12 Noted by Pound, 'Judge Holmes's Contribution to the Science of Law' (1920-21) 34 Harv LR 449 at 452-453. Salmond in the 7th edn of his *Jurisprudence* (the last by himself) distinguished between 'formal' sources, the will and power of the state, and 'material' sources, relating to the rule itself. The latter were sub-divided into 'legal' sources, chiefly legislation, precedent, custom and 'agreement'; and 'historical' sources, those which become 'law' when filtered through a 'legal' source. The first distinction has been dropped by editors since the 10th edn (see p 530 for reasons). Allen rejected the second distinction between 'legal' and 'historical' sources arguing that the gist of the matter is whether a source will be applied: *Law in the Making* pp 271-272. Salmond's dismissal of 'historical' sources from consideration was too facile, but the difference between these and 'legal' sources is important in a way that Allen overlooks. A judge cannot ignore statute, precedent or custom, but he has a discretion whether or not to resort to historical sources. The latter work differently from 'legal' sources. See chs 2, 10 post, and see also the account in the 3rd edn of the present work, ch 2.

analysis and synthesis, use is frequently made of analogical reasoning and what, for want of a better term, might be called the 'logic of justification'. This is the interpretation and manipulation within permissible limits of the law so as to justify decisions which are thought to be right. All these place judicial reasoning in a class of its own and will be considered in Chapter 7.

Something should also be said about persuasion. When challenging highly abstract propositions, to call for supporting evidence is often asking the wrong question. With statements at a low level of abstraction whose referents are ascertainable, it is important to call for these as evidence. With high-level abstractions, however, which have lost touch with their referential bases, to call for evidence may be an effective way of scoring a debating point, but it is unfair. For instance, the assertion that 'every society has a shared morality' cannot be proved by evidence in the same way as the assertion that 'the Prime Minister inhabits No 10 Downing Street' can be proved. Whereas the acceptability of factual, or near-factual, statements depends on a balance of probability on the evidence, the acceptability of highly abstract statements depends on a 'balance of plausibility', persuasion not proof, to which the following considerations are relevant. First, is there any consideration which might defeat or reduce the plausibility of an argument? Reductive analysis in search of referents will sometimes help. The argument must not be both pro and contra, and it must be relevant, ie not used as a smoke-screen. Also, it will have different weightings according to the sympathies of the audience, which affect its plausibility. Secondly, with intuitive arguments the need is to persuade the other side of the acceptability of one's point of view. Thirdly, persons with no convictions either way on an issue may be persuaded by a balance of plausibility, but those with strong convictions one way have to be prised out of what is often an entrenched position. Here a balance of plausibility alone may not suffice since it has to combat, eg loyalty to a prior commitment, refusal to admit a change of opinion, fear of being thought liberal or illiberal, and similar reactions. In such situations it is often the case that the more persuasive an argument is, the stronger is the resistance to it; which is why debates of this kind seldom seem to 'get anywhere', and this is often the case with jurisprudential disputes.

Nature, function and functioning of law

The nature of legal material, laws and legal system is mainly the concern of this book. Suffice it to say here that law consists largely of 'ought' (normative) propositions prescribing how people ought to behave. The crucial distinction between these and the laws of science lies here. The substrata of scientific laws are the observable uniformities of nature out of which laws are derived. Legal laws express ideas as to hoped-for behaviour; the laws are not derived from the behaviour. Scientific laws, therefore, *describe* observable behaviour patterns of natural phenomena and are a basis for predicting how the phenomena will behave. The phenomena do not 'obey' the laws, and it is nonsensical to say that a scientific law is such and such, but that the phenomena do not conform to it. If they do not conform, the law is wrong and must be changed. There is thus exact correspondence between prediction and behaviour. Legal laws, on the other hand, *prescribe* how people

ought to behave.[13] It is not nonsense to say 'X ought not to steal' and also 'But X does steal'. A law is not 'wrong' because people disobey it. Therefore, prescription of behaviour and description of actual behaviour bear only a rough correspondence; the aim is to achieve as much correspondence as possible. The law also consists of material other than prescriptions and these will be dealt with in the next chapter.

The function of law connotes purpose. The 'oughts' of laws are variously dictated by social, moral, economic, political and other purposes. The overall purpose of law may be thought of as the achievement of justice, which will be considered in Chapter 4. The functioning of law concerns its working. On the one hand, there is the application of law in deciding disputes and by way of enforcement. The former involves consideration of the judicial process with all its institutional and conceptual apparatus. On the other hand, there is the extent to which laws are obeyed or disobeyed and the ways in which the behaviour of people diverges over long periods from the norms of the law. All these will be dealt with in various parts of the book.

Broadest possible basis

Law is a social institution. A society may be described as an association of people with a measure of permanence. A 'civic society' is said to comprise (1) territory, (2) perpetuity, (3) a measure of independence, and (4) a culture as manifested in its art, philosophy, law, morality, religion, fashion and opinion[14]. The last five, namely, law, morality, religion, fashion and opinion, are modes of social control in that they prescribe in various ways how people ought to behave. Law is distinguishable from the others with reference to the criteria of validity already mentioned, but the relationship between them is a matter for jurisprudential study.

More important is the inextricable interrelation between law and philosophy, sociology, ethics and politics. The training of lawyers has hitherto failed to take sufficient account of the essential unity of law and these other disciplines. They are not just related to each other, but interwoven; their pattern is not that of circles which touch at their circumferences, but of circles which overlap. Only on such an integrated basis is it possible for lawyers to approach their subject meaningfully and improve its serviceability. Indeed, jurisprudence might well be described as the lifemanship of the law. No one can be a good lawyer who only knows law. As Buckland well said, 'A man will be a better lawyer, as he will be a better architect or physician, if his mind is open to the movements of thought on the profounder issues of

13 Thus, Lord Wright said of law: 'Its purpose is to regulate man's conduct in relation to external things and persons, not merely to ascertain and explain what happens in fact': 'Precedents' (1943) 8 CLJ 124. So, too, Goodhart: 'in the physical sciences we have a *description* of conduct, while in the social sciences we have a *prescription* for conduct': *English Law and the Moral Law* p 9. The distinction was expressed by Kelsen in terms of the 'ought' and the 'is', *Sollen* and *Sein*, eg in *General Theory of Law and State* pp xiv, 35-42, and for his theory, see ch 17, post. See also Castberg *Problems of Legal Philosophy* p 53; Hart *The Concept of Law* pp 78-79. For Hall, on the other hand, the legal prescription is also to some extent descriptive of the significance of the rule: 'Concerning the Nature of Positive Law' (1948-49) 58 Yale LJ 560.

14 Johnson *Sociology* p 9.

life, beyond his immediate professional concerns. And, if his mind is so open, he can hardly fail to have some sort of philosophy of his own'[15].

Of the philosophical aspects, which are more or less useful to lawyers, that which is outstandingly relevant is logic and various kinds of reasoning. There are also questions of semantics, method and definition, which have been dealt with. Part III of this book will deal with some philosophies of law, which will reveal the manner in which people in different countries at different times have speculated about some of the problems examined in the preceding Parts. It is not enough to enhance merely the technical efficiency of a lawyer, important though this is; he should also be invited to broaden his outlook by treading along paths from which he will be able to perceive new horizons and be invigorated by scholarship in other spheres. Speculations about law by past and present thinkers are part of intellectual culture. Even where theories are open to criticism they possess value and later theories can be better understood in the light of them. This book can do no more than try to indicate directions along which such inquiries can be pursued and where the wisdom of great thinkers is to be found. It might be convenient to refer to a particular theory alongside the discussion of the problem most nearly connected with it in Parts I and II; but whether one does this, or waits until Part III is a matter of preference. Taken as a whole, therefore, jurisprudential study ranges from minute analytical dissections and sharp distinctions at one end of the intellectual scale to the broad sweep of ideas and philosophies through the ages at the other.

Sociology is a theoretical study of social existence based on descriptions of social facts[16]. From the point of view of the sociologist the administration of law is an observable social fact, while from the point of view of the lawyer it is obvious that laws can only function in a social environment, that they are bound to be influenced by the prevailing climate of opinion and tendencies and that, to a lesser extent, the continued enforcement of laws does in its turn affect people's outlook. More specifically, three aspects of sociology can be singled out as being peculiarly relevant to a lawyer's understanding of law, namely history, anthropology and economics. Historical development frequently accounts for and explains present-day doctrines; anthropology increasingly provides valuable insights into institutions of the modern state; while the influence of the economic order on the structure of both laws and society has been amply demonstrated. With regard to ethics, this, again speaking broadly, is a theoretical study of what is implied by prescriptions of what ought to be or ought not to be[17]. Insofar as the 'oughts' of laws imply aims to be achieved, the element of ethical evaluation inherent in the content of laws becomes clear.

The alleged autonomy of analytical jurisprudence, history, sociology and ethics

It used to be fashionable to draw contrasts between these, but to do so would be to paint a misleading picture. For, in the first place, the suggested

15 Buckland *Some Reflections on Jurisprudence* p 47. See also Julius Stone's treatment, *Legal System and Lawyers' Reasonings* pp 18 et seq; Jerome Hall *Foundations of Jurisprudence* (on which see p 485-487, post); Lord Radcliffe *The Law and its Compass* p 93.

16 Emmet *Rules, Roles and Relations* pp 5-6. See generally Sprott *Sociology*; Johnson *Sociology. A Systematic Introduction*, Part I.

17 *Emmet* pp 5-6.

distinction between analytical jurisprudence, on the one hand, and history and sociology, on the other, is non-existent. Ever since Bentham and Austin 'analytical jurisprudence' has been associated with the formal analysis of legal concepts, but the opposition between this and history and sociology is rooted in a confusion between the *subject matter* of a study and the *method* by which it is pursued. 'Analytical' connotes a method of approach which applies not only to formal, but also to historical and sociological study. One may analyse the structure of laws as they are found, or their purpose and operation in society, or their historical evolution. For this reason Salmond's classification, for example, is to be rejected. He divided jurisprudence into Analytical, Historical and Ethical. The former, he explained, is the analysis of the first principles of the law 'without reference either to their historical origin or development or to their ethical significance or validity'[18]. The distinction is not one of kind, but of emphasis. They are both analytical; in the one case attention is fixed on the law as it is today, in the other on development over a period of time. Moreover, insofar as history is only a branch of sociology a similar objection applies to any distinction between analytical and sociological study. Analysis is necessary to any sort of fruitful exposition, and it is misleading even to suggest that sociology is not concerned with analysis. It would be worthless if it were not. Here, too, the contrast is not that one type of study is analytical while the other is not, but that in the one, analysis is applied to the formal structure of law while in the other, analysis reaches beyond this into the way in which it works in society.

In the light of the above objection it might be thought that the word 'analytical' could be shared by these studies, but in such a way as to preserve distinctions between formal analysis, historical analysis and sociological analysis. Even such distinctions, however, are frequently untenable. In the case of many institutions, notably of the common law, formal analysis of them as they are inevitably dovetails in with their historical evolution. Formal, historical and functional analysis cannot always be separated. Legal institutions do not exist *in vacuo*, but are there for some purpose. An important point is that even the formal structure of concepts is constantly being re-shaped according to the functions they are made to perform. Indeed, all analysis is ultimately directed towards an understanding of the subject matter, and formal analysis alone will not provide a complete understanding of legal material because there has also to be an examination of the purpose for which it is there and how it works in the context of actual situations.

Just as analysis cannot be divorced from history and sociology, so, too, sociology is not independent in ethics. Social problems are grounded in ethical evaluation. For instance, as Professor Emmet has observed, the problem of juvenile delinquency is seen to be a *problem*, not because it prevails,

18 Salmond *Jurisprudence* (7th edn). Salmond's view has been discarded in the 12th edn by Fitzgerald. Stone has suggested that the separate identity, traditionally given to historical jurisprudence, sprang from its early emergence on the Continent: *The Province and Function of Law* p 35. Salmond drew another distinction between historical jurisprudence and legal history on the basis that the former was the analytical aspect of history: *Jurisprudence* (7th edn) p 6; and see Keeton *The Elementary Principles of Jurisprudence* p 7. This distinction is wholly unreal. The innuendo is that legal historians do not analyse. Nothing is more untrue, and the point is well made by Allen *Legal Duties* p 13. For a similar distinction between comparative law and comparative jurisprudence, see Wigmore. 'A New Way of Teaching Comparative Law' (1926) JSPTL 6. For a possible distinction between 'sociology of law' and 'sociological jurisprudence', see pp 422-423 post.

but because it is thought to be *bad*. Again, the most suitable method of resolving some social problem often depends upon built-in ethical considerations. As a solution to the over-population problem the periodic slaughter of all new-born babies will not even be contenanced, not because it would not solve the problem, but because it would be unworkable owing to the moral sentiments of people. Finally, many social aims, such as 'stability', 'cohesion', 'education', 'health' and the like are value-laden and are posited as goals of society because they are approved[19].

Ethical evaluation, for its part, cannot be kept apart from sociology. Moral judgment by its very nature implies decision about action in some situation, and all information relevant to that situation needs to be taken into account. Furthermore, the moral judgment passed on conduct is often dependent upon the social relationship, or role, that is involved. For example, the moral judgment on a man who turns his back on a beseeching child will depend not only on the relation of the man to the child (eg parent or stranger), but also on the role which the child is fulfilling (eg collecting for Guy Fawkes, soliciting for immoral purposes and so on).

It is evident, therefore, that the study of jurisprudence should not be insulated from these other disciplines. When it comes to practical techniques their interrelation is no less obvious. Four different techniques are discernible. (a) **Judicial technique.** A point, to be amplified later, is that laws do not of themselves decide disputes, for they have to be applied to the case in hand. This process leaves to the judge an element of choice[20], which is guided by a variety of considerations, philosophical, historical, social and moral[1]. (b) **Legislative technique.** The need to clarify the social problem that requires legislation and to evaluate the objective in view requires no further emphasis. (c) **Administrative technique.** An element of discretion in giving effect to policy decisions is inescapable and the modern tendency is to enlarge this. Such discretion is again guided by social and moral considerations. (d) **Advisory technique.** Lawyers advising clients or arguing in court have to take account, not only of laws, but also of how they are likely to be applied by courts. This combines prediction of how a court is likely to decide and persuasion of the court so that the prediction is fulfilled. They thus have to gauge as best they can the influence on judges of current social, moral and other pressures.

To insist in this way on the unity of legal, sociological and ethical study is not to dismiss purely formal analysis as valueless. All that is urged is that while this is important, it is no more an end in itself than the foundations of a house.

So far stress has been laid on the need to approach jurisprudential study with the aid of every relevant discipline. This, however, is separate from the question whether so broad-based an approach should be directed to speculating about English law in particular, or perhaps just the common law systems, or law generally. Much will depend on the level of abstractness at which the problems are presented. For example, problems of law and order are common to all systems, but problems of binding precedent can only arise in common law systems. A related question is whether the material, which furnishes the basis for speculation, should be drawn from one system, or a

19 Emmet *Rules, Roles and Relations* ch 2, especially pp 19 et seq.
20 Pp 151 et seq. post.
1 Cardozo *The Nature of the Judicial Process* pp 30–31, and passim; ch 10 post.

few, or all systems. Here the limitation is a practical one, and this is what is hinted at by the word 'possible' in the phrase 'broadest possible basis'. These questions, which have not always been distinguished, have given rise to some debate as to whether the study should proceed on a particular, comparative or general basis.

The particular basis derives its material exclusively from one system of law, the comparative basis derives its material from more than one system, while the general basis presupposes certain notions as being common to all, or a large number of systems. Many writers have paid lip-service to general jurisprudence such as Austin, Holland and Allen, but have not adhered to it in their treatment. Austin dealt mainly with English law with occasional allusions to Roman Law. It is possible that underlying his thinking was the belief that the common and civil law between them would cover the civilised world and so constitute 'general' jurisprudence. In any case, his references to Roman law are too few and superficial even for this purpose. Holland, in spite of an uncompromising adherence to general jurisprudence, proceeded mainly with an exposition of English law; Allen's treatment is comparative at most. Besides, the arguments that have been adduced in support of general jurisprudence have not always been convincing, and the following observations of Holland are worthy of comment. He supported his advocacy of general jurisprudence with an analogy drawn from geology.

> 'Principles of Geology elaborated from the observation of England alone hold good all over the globe, in so far as the same substances and forces are everywhere present; and the principles of jurisprudence, if arrived at entirely from English data, would be true if applied to the particular laws of any other community of human beings; assuming them to resemble in essentials the human beings who inhabit England.... The phrase [particular jurisprudence] may however, and probably does, mean: an acquaintance with the laws of a particular people; and the impropriety of describing such merely empirical and practical knowledge by a term which should be used only as the name of a science has been already pointed out'[2].

In the first place, the analogy is false. However true it may be that principles of geology derived from an observation of English data will apply elsewhere as well, this is so only because, as Holland himself says, 'the same substances and forces are everywhere present'. The point, however, is that the 'substances and forces' of law are not the same everywhere. Law is a social institution, and the structures of societies differ, their pressures differ, their traditions and environments differ. Secondly, he glosses over this obvious point by shifting attention from *communities* of human beings to *human beings* themselves, for it seems safe to say that at least human beings elsewhere in the world do 'resemble in essentials the human beings who inhabit England'. Everything then turns on what is signified by 'essentials': 'essential' to human beings as organic entities, or as social units, or what? This vital word is left unexplained. Thirdly, it is not easy to see what is meant by the word 'science' so that it comes to be associated with general, but not with particular, jurisprudence. Fourthly, the passage commits two of the semantic sins mentioned earlier. The word 'jurisprudence' is alleged to possess a 'proper' meaning, which would exclude the term 'particular jurisprudence' as 'improper'. Again, not only is the emotive connotation of 'science' used to evoke a

2 Holland *Elements of Jurisprudence* p 11. For criticism, much of which is adopted here, see Buckland *Some Reflections on Jurisprudence* pp 68-69.

favourable response to general jurisprudence, but the derogatory insinuation in the phrase 'merely empirical and practical' is used to evoke a correspondingly disparaging response to particular jurisprudence. It will be seen, therefore, that the passage fails to make out any case for general jurisprudence.

It has been suggested that the answer to the question whether the approach should be general or particular depends on how abstract the problem under review is. It will also depend on whether the study aims at formal or functional analysis, and, if formal, whether it proceeds constructively or demonstratively. If an analysis of form and structure is intended, those who seek to construct formal concepts will find themselves forced of necessity to confine their attention to the particular basis, or at most to the comparative[3]. Only supporters of the demonstrative method will find the general basis manageable. On the other hand, functional analysis may conveniently be conducted on either a particular or general basis. Generalised functional jurisprudence might include such things as general methods of reasoning (eg deduction, analogy etc) and general adaptability to social and moral change.

Adaptation, improvement and reform

Jurisprudence is concerned, not only with the law and its institutions as they are and with their social impact, but also with improving them and changing them in line with social developments. This brings in the pressures behind change and the machinery of change. These matters will be considered in Chapter 15.

Conceptual framework for jurisprudential study

Emphasis has been laid on the need to engage every relevant discipline for the purpose of study. These wide ranging pursuits and the functioning of law in particular make it obvious that law has to be considered in the sense of a legal system, and the conceptual framework needed to unify all this is a temporal one. A legal system, as the word 'system' implies, is a co-ordinated and purposive activity. Now, every activity must occupy some time over its functioning; from which it follows that every functioning phenomenon, together with its component elements, must continue to exist over that period of time. Therefore, the conditions essential to continued existence and factors relating to functioning are implicitly part of the concept of it as a functioning phenomenon. An analogy may help. It is usual to regard, for instance, a human being as a three-dimensional entity possessing length, breadth and depth. This, however, is the concept of an instantaneous person, who has length, breadth and depth for a moment and vanishes. In the real world there is no such thing as an instantaneous person; he or she endures over a period of time, which introduces the dimension of endurance in which length, breadth and depth endure together. The continued existence of a person depends on certain essential conditions, such as a minimum intake of calories, oxygen, parameters of temperature, of states of health and so on. A graph of an enduring human being, if such were possible, would depict a person

3 Cf *Formation of Contracts. A Study of the Common Core of Legal Systems* (ed Schlesinger) for the unwieldly result of trying to encompass a large number of systems even on a single topic.

rather like a four-dimensional worm extending in time[4]. There are thus two frames of thought, the time-frame of the present and that of continuity, ie the continuum. 'Present' does not mean 'instantaneous', but a very limited time-frame covering the immediate concern as distinct from indefinite duration. The idea of a 'four-dimensional worm' may seem abstract and remote from reality until one realises, with some sense of shock, that of the two the familiar, everyday three-dimensional conception is the more abstract and unreal, since it is that of an 'instantaneous person', which does not exist. So, too, with legal system and laws. A law is not designed to be in force for an instant or only for today, but to operate over a period of time. A 'momentary law' is as inconceivable as a 'momentary person'. More important is the point that as soon as one thinks of a legal system or a law as continuing, then everything implied by the idea of continuity becomes an *integral part* of the concept of the continuing phenomenon. Nor can one contemplate continuity without taking account of the factors relating to origin and continued existence and those relating to function (purpose) and functioning (operation).

Which, then, is more 'real': a human being or law which lasts only here and now, or a continuing human being or law? The obvious answer might lead one to reject the present time-frame entirely, but this would be a mistake. Thinking in both frames is useful in different contexts. For the purpose of accommodating persons round a table, for example, the concept of each as a three-dimensional entity suffices; the conditions of continued existence are superfluous. In situations where existence is of moment, such as a prolonged stay in a hotel or in space, the conditions essential to existence become vital. Again, the idea of a living fish implies an environment of water, and so on. Similarly, the validity of a law is all that is needed for immediate purposes, but the idea of a continuing law automatically imports the factors that brought it into being, keep it going, modify, weaken or kill it, as well as those that determine how in fact it works in its social environment.

To regard legal phenomena in a continuum will provide the unifying framework for the study of law in relation to other disciplines, especially sociology and ethics. There is much loose talk about the 'sociological' study of law, which so often ends in platitudinous generalities—the worst kind of mental training. The temporal approach offers a modest but systematic plan by asking: What factors (social, political, moral etc) brought about a rule of law? What factors keep it going? (which need not necessarily be the same as those which brought it about). How does it work? (which calls for an investigation into its structure, its efficiency in fulfilling its task and the factors that affect its working)[5]. Can it be improved? Such questions reach out into sociology, ethics and other fields with limitless ramifications.

The present book will develop this temporal approach in various contexts, and it is submitted that in a time-perspective some traditional puzzles can be resolved, while others assume different proportions. It is also worth pointing out that this approach involves no statement in the form 'Law is ...'.

4 This analogy is taken from Eddington *The Nature of the Physical World* pp 53, 87. The expression 'four-dimensional worm' is his. For the temporal approach to law explained above and its relation to Hurst *Justice Holmes on Legal History*, see Dias 'Temporal Approach Towards a New Theory of Natural Law [1970] 28 CLJ 75 at 76 n3. A temporal basis is also implicit in Hall's 'integrative jurisprudence': *Foundations of Jurisprudence* (see pp 485-487 post).

5 Cf Hall's basis of 'law-as-action': *Foundations of Jurisprudence* on which see p 486 post.

What it offers is a way of looking at laws, indeed of any phenomena, and, as such, is entirely non-committal as to the nature of law.

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CHAPTER 2

Legal material

Thought about law presupposes some acquaintance with the law itself; which is why the study of jurisprudence becomes meaningful only towards the middle or, preferably, the end of a first course in law. It has been suggested that legal material can be identified with reference to the use of the word 'law' by courts. The detailed rules so identified are traditionally distributed under various labels such as contract, tort, crime, property and so forth, and new categories keep emerging such as obligations, intellectual property and others. Reflection on the nature of this material, however it may have been presented, shows that it is not of uniform texture. There are, again, different ways of classifying the texture. The one that will be adopted here is according to the functions performed by different kinds of material. There are:

(1) duties prescribing how people ought, or ought not, to behave with regard to others, who are said to have correlative claims or rights;
(2) liberties or freedoms to act and not to act;
(3) powers to alter existing legal situations;
(4) immunities from having existing legal situations altered;
(5) means of achieving legal ends;
(6) definitions;
(7) location of legal relationships;
(8) principles, doctrines and standards.

The first four concern legal relationships between persons and are termed 'jural relations'[1].

JURAL RELATIONS

Claims, liberties, powers and immunities are subsumed under the term 'rights' in ordinary speech, but for the sake of clarity and precision it is essential to appreciate that this word has undergone four shifts in meaning. They connote four different ideas concerning the activity, or potential activity, of one person with reference to another.

(1) Y's duty with regard to X would be expressed by X as 'you ought (must)': (X is then said to have a claim or right, *stricto sensu*).
(2) X's freedom to do something in relation to Y would be expressed by X as 'I may': (X has a liberty or privilege).
(3) X's ability to alter Y's legal position would be expressed by X as 'I can': (X has a power).

1 For their importance, see Kohler *Einführung in die Rechtswissenschaft* s 6; Ahrens *Cours de droit naturel* s 23; Savigny *System des heutigen römischen Rechts* ss 4, 52; Pashukanis *Allgemeine Staatslehr und Marxismus*; Kocourek *Jural Relations* chs 1-3.

(4) Y's inability to alter X's legal position would be expressed by X as 'you cannot': (X has an immunity)[2].

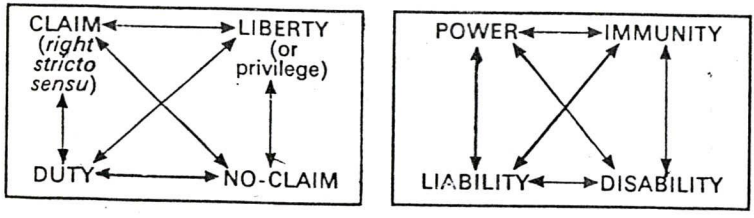
The use of the homonym 'right' to denote these separate ideas obscures the distinctions and leads to confusion sooner or later. It would be helpful, therefore, to make the distinctions as obvious as possible by allotting to each a term of its own[3].

These distinctions were arrived at gradually. Hobbes criticised Sir Edward Coke for failing to see the distinction between being bound (claim-duty relation) and being free (liberty)[4]. It is also apparent from a work of Bentham, published only in 1945[5], that he too distinguished, clearly and convincingly, between claim and liberty. His work was lost to his successors until recently, but may have been known to his disciple Austin, who drew the same distinction rather tentatively[6]. In 1862 Windscheid distinguished between claim and power[7]. Thereafter, Thon in 1878[8] and Bierling in 1883[9] distinguished between claim, liberty and power. In 1902 Salmond also distinguished between these three and the corresponding ideas of duty, disability and liability[10]. Finally, in 1913 Hohfeld, an American jurist, rearranged and completed Salmond's scheme by adding a fourth term, immunity, and worked out a table of jural relations with incisive logic[11]. The work so brilliantly pioneered has been developed and expanded in many directions.

Hohfeld set out his table of jural relations as follows:

Jural Correlatives	Right	Privilege	Power	Immunity
	Duty	No-right	Liability	Disability
Jural Opposites	Right	Privilege	Power	Immunity
	No-right	Duty	Disability	Liability

The following presentation of this table is that of Professor G L Williams[12].



2 The phrases 'you must', 'I may', etc were suggested by Corbin 'Legal Analysis and Terminology' (1919) 29 Yale Law Journal 165.

3 Cardozo *The Growth of the Law* p 30; Stone *Legal System and Lawyers' Reasonings* p 138; Ogden and Richards *The Meaning of Meaning* pp 130–131.

4 Hobbes *Dialogue between a Philosopher and a Student of the Common Laws of England* vi, 30.

5 Bentham *The Limits of Jurisprudence Defined* (ed Everett) ch 2, re-published in 1970 as *Of Laws in General* (ed Hart) ch 10 and Appendix B.

6 Austin *Jurisprudence* I, p 356.

7 Windscheid *Lehrbuch de Pandektenrechts* I, s 37.

8 Thon *Rechsnorm und subjektives Recht* cap 5.

9 Bierling *Zur Kritik der juristischen Grundbegriffe* II, pp 49–73.

10 Salmond *Jurisprudence* (7th edn) ss 74–77.

11 Hohfeld *Fundamental Legal Conceptions* ch 1. His early death prevented him from completing the task he outlined. His scattered writings were collected and published posthumously under the editorship of W W Cook in 1923.

12 In Salmond *Jurisprudence* (11th edn) p 278, and 'The Concept of Legal Liberty' in *Essays in Legal Philosophy* (ed R S Summers) 121. Professor Williams's own terminology is not quite the same as Hohfeld's, for he has suggested certain changes.

An important preliminary point is that a jural relation between two parties should be considered only between them, even though the conduct of one may create another jural relation between him and someone else. In *Chapman v Honig*[13] the defendant's action in terminating the plaintiff's tenancy was lawful (ie he had a liberty) as between them, although it was at the same time unlawful (ie breach of duty) as between defendant and the court (contempt).

When operating the scheme the following formulae will be helpful.

Jural Correlatives (vertical arrows and read both ways): '... in one person, X, implies the *presence* of its correlative, ..., in another person, Y'. Thus, claim in X implies the presence of duty in Y (but in so far as duties may exist without correlative claims[14], the converse proposition is not always true). Again, liberty in X implies the presence of no-claim in Y, and *vice versa*.

Jural Opposites, including what one might here call *jural negations* (diagonal arrows and read both ways): '... in one person, X, implies the *absence* of its opposite, ..., in *himself*'. Thus, claim in X implies the absence of no-claim in himself, and *vice versa*; duty in X implies the absence of liberty in himself, and *vice versa*.

The merit of Professor Williams's presentation is that it is possible to discern at a glance a third set of jural relations not mentioned by Hohfeld. These may be called

Jural Contradictories (horizontal arrows and read both ways): '... in one person, X, implies the *absence* of its contradictory, ..., in *another* person, Y'. Thus, claim in X implies the absence of liberty in Y, and *vice versa*. In the case of duties with correlative claims, a duty in X (absence of liberty) implies the absence of no-claim in Y and *vice versa*. (The question whether there are non-correlative duties will be discussed below).

With these formulae in mind the scheme may now be considered in detail.

CLAIM-DUTY RELATION ('YOU OUGHT')

Hohfeld himself suggested the word 'claim' as a substitute for 'right', but continued to use 'right'. 'Claim', however, will be preferred in this book. He did not deal at length with this relation, believing that the nature of claim and duty was sufficiently clear. This was perhaps rather a facile assumption. He did, however, point out that the clue to claim lies in duty[15], which is a prescriptive pattern of behaviour. A claim is, therefore, simply a sign that some person ought to behave in a certain way. Sometimes the party benefited by the pattern of conduct is able to bring an action to recover compensation for its non-observance, or he may be able to avail himself of more indirect consequences. At other times, he can do nothing[16].

13 [1963] 2 QB 502, [1963] 2 All ER 513.

14 Pp 26-27, post.

15 Hohfeld *Fundamental Legal Conceptions* p 38. Duty is discussed in ch 11, post.

16 Many tests have traditionally been offered for 'rights' in a broad sense. (1) Presence of a duty. This is no test even for 'right' in the narrow sense of claim. Non-correlative duties, discussed in the text, would be one answer; but, apart from that, a contract in which the promisor undertakes to do something for the promisee and a third party confers no claim on the latter. (2) Morality: Grotius *De Jure Belli ac Pacis* 1.1.4; Pufendorff *De Naturae Jure et Gentium* 1.30; Phillips *Jurisprudence* pp 6-8, 27; Rutherford *Institutes of Natural Law* II, s 3;

The correlation of claim and duty is not perfect, nor did Hohfeld assert that it was. Every claim implies the existence of a correlative duty, since it has no content apart from the duty. The statement, 'X has a claim', is vacuous; but the statement, 'X has a claim that Y ought to pay him £10', is meaningful because its content derives from Y's duty. On the other hand, whether every duty implies a correlative claim is doubtful. Austin admitted that some duties have no correlative claims, and he called these 'absolute duties'[17]. His examples involve criminal law. Salmond, on the other hand, thought that every duty must have a correlative claim somewhere[18]. Allen supported Austin[19]. Professor G L Williams treats the dispute as verbal[20]. Duties in criminal law are imposed with reference to, and for the benefit of, members of society, none of whom has claims correlative to these duties. As far as their functioning is concerned, it is im naterial whether the claims are in the Crown, the Crown in Parliament, or whether there are any claims.

Statutory duties furnish other examples. It rests on the interpretation of each statute whether the duties created by it are correlative to any claims in the persons contemplated by the duties. It was held in *Arbon v Anderson*[1] that even if there had been a breach of the Prison Rules 1933, which had been made under the Prison Act 1898, s 2, a prisoner affected by such a breach

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(possibly) Allen *Legal Duties* p 200. However, a case like *Bradford Corpn v Pickles* [1895] AC 587, shows that a defendant can have a legal 'right' (liberty) to act unmorally and spitefully. (3) Interest: Ihering *Geist des römischen Rechts* III, p 339; Salmond *Jurisprudence* p 217; Heck *The Jurisprudence of Interests: an Outline*, in *20th Century Legal Philosophy Series* (trans Schoch) II, p 33. The House of Lords acted on the interest basis in *Gouriet v Union of Post Office Workers* [1978] AC 435, [1977] 3 All ER 70. See also *Ex p Island Records Ltd* [1978] Ch 122, [1978] 3 All ER 824. However, (a) a 'right' does not always coincide with the interest, eg a trust, where both law and equity acknowledge the legal 'right' in the trustee although the interest is not in him, and common law gives no 'right' to the beneficiary who has the interest. (b) Not all interests give rise to 'rights', eg an employer's interest in not having strikes gives him no 'rights' against his employees; nor does the interest which a husband has in his child being borne by his wife, give him a 'right' against her not to abort her pregnancy: *Paton v Trustees of BPAS* [1979] QB 276, [1978] 2 All ER 987. If anything, 'rights' are only 'protected interests': Salmond *Jurisprudence* p 218. This shows that the protection of some interests, but not others, is not grounded in the mere fact of an interest: *Phipps v Pears* [1965] 1 QB 76 at 84, [1964] 2 All ER 35 at 38. (c) A 'right' is not the interest, but the means by which it is secured: Gray *The Nature and Sources of the Law* p 18; Allen *Legal Duties* pp 218–219; Merkel *Juristische Enzyklopädie* s 159. (4) Attitude of demand: Vinogradoff 'The Foundations of a Theory of Rights' in *Collected Papers* II, p 367. 'Rights', however, inhere in people who have no attitude of demand, eg a baby, or as in *Cooper v Phibbs* (1867) LR 2 HL 149 (a person contracted to take a lease of a fishery, but the contract was held void since the fishery belonged to him all the time, ie the 'right' was in him though he clearly had no attitude of demand). (5) Power of enforcing the correlative duty: Gray *The Nature and Sources of the Law* pp 12, 18; Holland *Elements of Jurisprudence* p 83; to which the objections are, (a) that a person may set enforcement machinery in motion and yet have no 'right' himself, eg criminal law machinery. (b) If enforcement means a successful action, such success depends on the 'right', not *vice versa;* Olivecrona *Law as Fact* (1939) pp 85–86; 'Law as Fact' in *Interpretations of Modern Legal Philosophies* (ed Sayre) ch 25. For enforcement generally, see pp 235–246, post. A possible explanation for these attempts to find some basis for 'rights' may be the mistaken belief that every word must correspond with some 'thing'. Professor Hart, who appreciates this, brought to bear a different technique of elucidation: 'Definition and Theory in Jurisprudence' (1954) 70 LQR at 49.

17 Austin *Jurisprudence* I, pp 401–403

18 Salmond *Jurisprudence* (7th edn) p 240

19 Allen *Legal Duties* pp 183–193

20 In Salmond *Jurisprudence* (11th edn) pp 264–265.

1 [1943] 1 All ER 154. See also *R V Customs and Excise Comrs, ex p Cooke and Stevenson* [1970] 1 All ER 1068, [1970] 1 WLR 450.

had no action since he had no claim. The decision in *Bowmaker Ltd v Tabor*[2] creates a difficulty. The Courts (Emergency Powers) Act 1939, s 1(2), forbade hire-purchase firms to retake possession of things hired without first obtaining leave of court. The claim to damages was conferred by the statute on any hire purchaser from whom goods were retaken without the necessary leave having been obtained. In this case the defendant purchaser consented to the plaintiffs retaking possession of the article hired, and they did so without obtaining leave of court. The plaintiffs later sued the defendant for arrears of rent, which had accrued up to the time of the retaking, and the defendant counterclaimed for damages under the statute. The Court of Appeal held that he was entitled to damages. This means that there was a duty to pay damages, which was correlative to the claim to receive them. The duty not to retake possession without leave of court was, as the Court pointed out, imposed in the public interest and not for the benefit of an individual. The defendant, therefore, could not absolve the plaintiffs from it. The inference is that the claim was not in him[3]. The further question as to why the defendant's consent to the plaintiffs' course of action did not debar him from exercising his claim to damages was answered by the Court on the ground that consent, or *volenti non fit injuria*, is no defence to a breach of this kind of statutory obligation[4].

Conduct is regulated by the imposition of duties. Claims may assist in achieving this end, but if it can be otherwise achieved, there is no reason why the mere fact that Y is under a duty with regard to X should confer upon X, or anyone else for that matter, a corresponding claim[5]. There is nothing to prevent it being the law that every breach of duty, of whatsoever sort, shall be dealt with by the machinery of the state. Such a state of affairs, though possible, would be inconvenient, for it would stretch state machinery to breaking point. Where duties are of private concern, the remedies are best left to individuals to pursue in the event of their breach. Above all, it is expedient to give aggrieved persons some satisfaction, usually by way of compensation. Every system of law has to decide which breaches of duties shall be taken up by the public authorities on their own motion, and which shall be left to private persons to take up or not as they please. The distinction between 'public' and 'private' law is quite arbitrary. It would seem, therefore, that there is no intrinsic reason why claims should be a necessary concomitant of duties[6]. Indeed, some modern writers, for different reasons, reject the whole idea of claim as redundant[7].

If non-correlative duties are accepted, they do not fit snugly into the Hohfeldian scheme.

2 [1941] 2 KB 1, [1941] 2 All ER 72.

3 This is supported eg by Lord Atkin in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 at 88, [1940] 4 All ER 527 at 533, who said that 'a duty imposed by statute is primarily a duty owed to the state'.

4 Cf *Carr v Broderick & Co Ltd* [1942] 2 KB 275, [1942] 2 All ER 441.

5 Kelsen *General Theory of Law and State* p 85.

6 Radin 'A Restatement of Hohfeld' (1938) 51 Harv LR 1149-1150, says that X's claim and Y's duty are the same thing. On the argument above, his statement is unacceptable.

7 Eg Duguit *Law in the Modern State* (trans F and H Laski), and see Laski 'M Duguit's Conception of the State' in *Modern Theories of Law* (ed Jennings) ch 4; Kelsen *General Theory of Law and State*; Olivecrona *Law as Fact* (1939).

LIBERTY-NO-CLAIM RELATION ('I MAY')

Hohfeld distinguished the freedom which a person has to do or not do something from claim, and called it 'privilege'; but the term liberty will be preferred. X's so-called 'right' to wear a bowler hat consists, on Hohfeld's analysis, of a liberty to wear the hat and another liberty not to wear it. The relationship between claim, duty, liberty and no-claim can be explained in the following way.

(1) Duty and liberty are jurally 'opposite'. If, for example, X were under a duty *to wear* a bowler hat, this would imply the absence in him of any liberty *not to wear* it, ie the Hohfeldian opposite of duty means that there is no liberty to do whatever is opposite to the content of the duty. Similarly, if X were under a duty *not to wear* the hat, this would be the opposite of a liberty *to wear* it, ie there would be no liberty to do so[8]. The jural opposition between duty and liberty does not mean simply that the one cancels out the other, but that they will only have that effect when the content of one is irreconcilable with the content of the other[9]. For example, X normally has the liberty of wearing his hat. If he puts himself under a duty to wear it, his liberty and duty *of wearing* the hat are harmonious and co-exist[10]. It is only when he puts himself under a duty *not to wear* it that his liberty *to wear* it and his duty conflict and are jurally opposite.

The opposition may be illustrated by *Mills v Colchester Corpn*[11]. The owners of an oyster fishery had, since the days of Queen Elizabeth I, granted licences to fish to persons who satisfied certain conditions. The plaintiff, who satisfied them but was refused a licence, brought an action alleging a customary claim correlative to a duty in the defendants to grant him one. The Court held otherwise on the basis that the defendants had always exercised a discretion in the matter. This implied not only a liberty to grant licences, but also a liberty not to grant licences, which implied the absence of a duty to do so. If, then, they were under no duty to grant licences, the plaintiff could have no claim[12].

Sometimes it is held for reasons of policy that the liberty of doing a particular thing cannot be erased by a contrary duty. *Osborne v Amalgamated Society of Railway Servants*[13] lays down that the liberty of a member of Parliament to vote in any way he chooses on a given issue cannot be overridden

8 G L Williams suggests 'liberty (not)' instead of privilege to bring out the opposition between duty and privilege: 'The Concept of Legal Liberty' in *Essays in Legal Philosophy* 128-132. For illustrations in Roman law, see *Inst* 1.3.1; *D* 50.17.55.

9 Bentham had earlier demonstrated the logic more incisively than Hohfeld: see pp 338-339 post.

10 G L Williams instances the Larceny Act 1861, s 103, under which a person 'is authorised, and, if in his power, required' to effect an arrest. These words according to him confer both a liberty to arrest ('authorised') and a duty to do so ('required'): 'The Concept of Legal Liberty' p 134.

11 (1867) LR 2 CP 476. A liberty may be limited by circumstances which may create a duty to grant a licence: *David v Abdul Cader* [1963] 3 All ER 579, [1963] 1 WLR 834.

12 See also *Chaffers v Goldsmid* [1894] 1 QB 186, 63 LJQB 59 (a member of Parliament has a liberty to present the petition of a constituent to Parliament and an equal liberty not to present it. Hence he is not under a duty to do so). (This example is in G L Williams, 'The Concept of Legal Liberty' p 142). In *Bradford Corpn v Pickles* [1895] AC 587, a landowner's liberty of abstracting subterranean water implies that he has no duty not to abstract it. See also *Langbrook Properties Ltd v Surrey County Council* [1969] 3 All ER 1424, [1970] 1 WLR 161, and *Chapman v Honig* [1963] 2 QB 502, [1963] 2 All ER 513, and p 25, ante.

13 [1910] AC 87.

by a contractual duty to vote in a certain way. Similarly in *Redbridge London Borough v Jacques*[14], the respondent had for several years stationed his vehicle on a service road in the afternoons of early closing days and had operated a fruit and vegetable stall from the back of it. The local authority was aware of this practice and had raised no objection. It then charged him with obstructing the highway. The justices dismissed the charge on the ground that the local authority had, in effect, given him a licence (liberty). The decision was reversed on the ground that where there is a public duty, created by statute, this prevents the conferment of a liberty to do what the duty forbids.

(2) If Y has a claim, there must be a duty in X. A duty in X implies the absence of a liberty in X. Therefore, a claim in Y implies the absence of a liberty in X, ie claim and liberty are 'jural contradictories'.

(3) Conversely, the presence of a liberty in X implies the absence of a claim in Y. Hohfeld calls this condition 'no-claim'. Therefore, a liberty in X implies the presence of a 'no-claim' in Y, ie liberty and no-claim are 'jural correlatives'. On the opposition between claim and no-claim there is this to be said. The opposition here is different from that between duty and liberty. No question of content arises. No-claim is simply not having a claim, and having a claim is not being in the condition of no-claim, just as having a wife is not being in a state of bachelordom (no-wife). If it is thought necessary to distinguish between the opposition of duty and liberty on the one hand, and no-claim and claim on the other, the latter might be styled 'jural negation' instead.

Distinction between claim and liberty

A claim implies a correlative duty, but a liberty does not. X's liberty to wear a bowler hat is not correlative to a duty in anyone. There is indeed a duty in Y not to interfere, but Y's duty not to interfere is correlative to X's claim against Y that he shall not interfere. X's liberty to wear the bowler hat and his claim not to be prevented from so doing are two different ideas. Thus, X may enter into a valid contract with Y where X gives Y permission to prevent him from wearing the hat, but X says he will nevertheless try to wear it. If X succeeds in evading Y and leaves the scene wearing the hat, he has exercised his liberty to wear it and Y has no cause for complaint. If, on the other hand, Y prevents him from wearing the hat, he cannot complain, for he has by contract extinguished his claim against Y that Y shall not interfere. This shows that the liberty and the claim are separate and separable; the claim can be extinguished without affecting the liberty[15].

It is usual for liberties to be supported by claims, but it is important to realise that they are distinct and separate, and the distinction is reflected in case law. It was held in *Musgrove v Chun Teeong Toy*[16] that at common law an alien has the liberty to enter British territory, but no claim not to be

14 [1971] 1 All ER 260, [1970] 1 WLR 1604.

15 Cf Hohfeld's demonstration *Fundamental Legal Conceptions* p 41.

16 [1891] AC 272. This case was originally quoted by Salmond. Cf Mackenzie King: 'It is not a "fundamental human right" of an alien to enter Canada. It is a privilege. It is a matter of domestic policy', quoted in *Re Hanna* (1957) 21 WWR NS 400. See also *R v Secretary of State for Home Department, ex p Bhurosah* [1968] 1 QB 266, [1967] 3 All ER 831.

prevented; which was re-affirmed in *Schmidt v Secretary of State for Home Affairs*[17]. *Chaffers v Goldsmid*[18] shows that a person has the liberty of presenting a petition to Parliament through his representative member, but no claim against such member that the latter shall comply. *Bradford Corpn v Pickles*[19] shows that a landowner has the liberty of abstracting subterranean water, but no claim against anyone else who, by abstracting the water before it reaches the landowner, prevents him from exercising his liberty. In *Cole v Police Constable 443A*[20], the court considered the position of a non-parishioner in extra-parochial churches, for example Westminster Abbey, which is a Royal peculiar. Although the language of the learned judges is open to criticism, their conclusion, translated into Hohfeldian terminology, was that a non-parishioner has a liberty to be in such a church, but no claim not to be prevented. Therefore, the plaintiff's ejection by the respondent, who acted under instructions from the Dean, gave him no cause for complaint. Again, in *Piddington v Bates*[1] the defendant, a trade unionist, in the course of a trade dispute insisted on going to the rear entrance of certain premises at which two pickets were already standing. To do so would not have been wrongful, for he would merely have exercised a liberty. In fact, however, the complainant, a police officer, who had decided that two pickets were all that were needed in the circumstances, prevented the defendant from going to the rear entrance. The latter then 'pushed gently past' the complainant 'and was gently arrested' by him. The defendant was found guilty of obstructing a constable in the exercise of his duty, since his liberty to stand at the entrance was not supported by a claim not to be prevented.

The failure to distinguish between claim and liberty leads to illogical conclusions. Thus, a member of the public has only a liberty to attend public meetings, which is not supported by a claim not to be prevented[2]. The tribunal in *Thomas v Sawkins*[3] argued at one point that such a liberty to attend was a 'right' and that, therefore, there was a duty not to prevent the person concerned, who happened to be a policeman. The conclusion is a *non sequitur*, since it fails to perceive the distinction between the two uses of 'right' as established by case law. If, as was probably the case, it was sought to create a claim-duty relation for reasons of policy, more convincing reasoning should have been employed. Cases on trade competition, whatever the merits of the decisions, present an array of fallacious propositions, which would have been avoided had the distinction between liberty and claim been perceived[4]. The claim not to be interfered with in trade corresponds to a duty

17 [1969] 2 Ch 149, [1969] 1 All ER 904. See also *DPP v Bhagwan* [1972] AC 60, [1970] 3 All ER 97.

18 [1894] 1 QB 186.

19 [1895] AC 587.

20 [1937] 1 KB 316, [1936] 3 All ER 107.

1 [1960] 3 All ER 660, [1961] 1 WLR 162. For other cases involving a similar analysis, see *O'Kelly v Harvey* (1883) 14 LR Ir 105; *Humphries v Connor* (1864) 17 ICLR 1; *Duncan v Jones* [1936] 1 KB 218; *Tynan v Balmer* [1967] 1 QB 91, [1966] 2 All ER 133.

2 *De Morgan v Metropolitan Board of Works* (1880) 5 QBD 155; *Brighton Corpn v Packham* (1908) 72 JP 318; *Bailey v Williamson* (1873) LR 8 QB 118; *R v Cunninghame Graham and Burns* (1888) 16 Cox CC 420; *Ex p Lewis* (1888) 21 QBD 191; *R v Brent Health Authority, ex p Francis* [1985] 1 All ER 74, [1984] 3 WLR 1317. There is a liberty to hold a public meeting, ie it is not unlawful: *Burden v Rigler* [1911] 1 KB 337; *Duncan v Jones* [1936] 1 KB 218.

3 [1935] 2 KB 249.

4 Eg *Mogul SS Co v McGregor, Gow & Co* (1889) 23 QBD 598 at 611 (affd [1892] AC 25); *Allen v Flood* [1898] AC 1 at 29, 84, 112, 132, 138, 151; *Quinn v Leathem* [1901] AC 495 at 534; *A-G (Australia) v Adelaide SS Co* [1913] AC 781 at 793; *Sorrell v Smith* [1925] AC 700 at 727;

not to interfere. There is indeed a duty not to interfere, eg by smashing up the plaintiff's shop; but no duty not to interfere by underselling him. So the question how far a duty not to interfere extends, ie how far the liberty of another person to interfere is allowed, is a delicate decision of policy. This is the real issue, which is thrown into relief when these situations are seen to involve conflicting liberties, but which is masked by the language of duties and claims[5].

The exposure of faulty reasoning also helps in assessing the effect and worth of decided cases. In *Thomas v Sawkins*[6], for example, the very demonstration that the conclusion was illogical when stated in terms of 'rights' and duties shows that the way to reconcile it with the established law is by saying that it has, in effect, created a new rule of law for policemen[7].

Finally, it may be observed that Hohfeld's analysis of claim, duty, liberty and no-claim is useful in many general ways. It may be used for drawing distinctions for purposes of legal argument or decision. It was held, for instance, in *Byrne v Deane*[8] that to call a person an 'informer' was not defamatory. Suppose a case where the allegation is that the plaintiff is a 'conscientious objector'. *Byrne v Deane* is distinguishable. An 'informer' is a person who gives information of crime; there is in law a duty to do so, and *Byrne's* case decides that it is not defamatory to say that a man has performed a legal duty. There is only a liberty to be a 'conscientious objector', and *Byrne's* case is thus no authority for saying that it cannot be defamatory to allege that a person has exercised this liberty[9]. Again, the analysis is useful in considering the relation between common law and equity; in particular, it helps to demonstrate the precise extent to which there was conflict. Thus, the life-tenant had at law the liberty to cut ornamental trees, in equity he was under a duty not to do so. The liberty and duty are jural opposites and the latter cancels out the former. At common law a party had a claim to payment under a document obtained by fraud, in equity he had no-claim. Further, such a person had at law the liberty of resorting to a common law court on such a document, whereas equity imposed on him a duty not to do so (common injunction)[10].

Liberty as 'law'

It has been shown that liberty begins where duty ends. Some have maintained that freedom is outside the law. Thus, Pound declared that liberty is 'without independent jural significance'[11], and Kelsen said, 'Freedom is an

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Crofter Harris Tweed Co Ltd v Veitch [1942] AC 435 at 462-466, [1942] 1 All ER 142 at 158-160.

5 G L Williams in 'The Concept of Legal Liberty' in *Essays in Legal Philosophy* p 141, exposes a faulty conclusion reached by Pollock in 'Gifts of Chattels without Delivery' (1890) 6 LQR 446; MacCormick 'A Note on Privacy' (1973) 89 LQR 23, exposes the fallacy in the argument of the majority Report of the Committee on Privacy ((1972) Cmnd 5012).

6 [1935] 2 KB 249.

7 Thus, Goodhart refers to it as 'A Constitutional Innovation' (1936-38) 6 CLJ 22.

8 [1937] 1 KB 818, [1937] 2 All ER 204. See also *Berry v Irish Times Ltd* [1973] IR 368.

9 Hamson, 'A Moot Case in Defamation' (1948) 10 CLJ 46.

10 Hohfeld *Fundamental Legal Conceptions* p 133.

11 'Legal Rights' (1916) 26 International Journal of Ethics 92 at 97.

extra-legal phenomenon"[12]. As to this, it is as well to remember that liberty may result (a) from the fact that legislators and judges have not yet pronounced on a matter, and represents the residue left untouched by encroaching duties, eg invasion of privacy; or (b) it may result from a deliberate decision not to interfere, as in *Bradford Corpn v Pickles*[13], or (c) from the deliberate abolition of a pre-existing duty, eg the statutory abolition of the duty forbidding homosexuality between consenting adults, or an Act of Indemnity absolving a person from a penal duty. There is some plausibility in saying with Pound and Kelsen that liberty in sense (a) lies outside law; but it seems odd to say that the liberty pronounced by a court in (b) and the statutory provisions in (c) are 'without independent jural significance' and 'extra-legal'. Analytically, the resulting position in all three cases is the same, namely, no duty not to do the act.

Kinds of liberties

Some liberties are recognised by the law generally, eg liberty to follow a lawful calling. So, too, are 'Parliamentary privilege' in debate and 'judicial privilege', which are liberties in the Hohfeldian sense in that both connote the absence of a duty not to utter defamatory statements. An infant's position (sometimes called in non-Hohfeldian language an immunity) in contracts for things other than necessaries is more complicated. In some cases it amounts to a power to repudiate the contract; in others it is not clear whether an infant has a liberty not to perform the contract, ie no primary duty to perform[14], or whether there is a sanctionless duty, ie a primary duty which he ought to fulfil, but no sanctioning duty to pay damages and instead an immunity from the power of judgment[15].

Other liberties are recognised by law on special occasions, that is to say, the normal duty not to do something is replaced in the circumstances by the liberty to do it, eg self-help, self-defence, the defences of fair comment and qualified privilege. Lastly, liberty may be created by the parties themselves, eg consent, or *volenti non fit injuria*, one effect of which is that it absolves a defendant from his duty[16].

Limits of liberties

Some liberties are unlimited, even if exercised maliciously, eg, 'Parliamentary' or 'judicial privilege'. *Non omne quod licet honestum est*[17]. In other cases, the exercise of liberties may be limited by the law of 'blackmail', by public

12 Kelsen *Das Problem der Souveränität* p 247; cf Kaufmann *Das Wesen der Völkerrechts* p 51; G L Williams 'The Concept of Legal Liberty' pp 122-123. See also p 369, post.

13 [1895] AC 587.

14 *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207.

15 If the infant performs he cannot recover unless consideration has wholly failed: *Valentini v Canali* (1889) 24 QBD 166; *Pearce v Brain* [1929] 2 KB 310; *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452.

16 *Wooldridge v Sumner* [1963] 2 QB 43, [1962] 2 All ER 978; *Stein v Lehnert* (1962) 36 DLR 159. At other times the effect of consent seems to be to leave the duty, but only waive the power of action: *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999. For the distinction, see Dias 'Consent of Parties and *Voluntas Legis*' [1966] CLJ 75.

17 *D* 50.17.144; eg *Bradford Corpn v Pickles* [1895] AC 587.

policy[18] or by malice, eg qualified privilege and fair comment in defamation, or by statute[19].

POWER-LIABILITY RELATION ('I CAN')

Power denotes ability in a person to alter the existing legal condition, whether of oneself or of another, for better or for worse[20]. Liability, the correlative of power, denotes the position of a person whose legal condition can be so altered. This use of 'liability' is contrary to accepted usage, but when operating the Hohfeldian table words have to be divorced from their usual connotations. X has a power to make a gift to Y, and correlatively Y has a liability to have his legal position improved in this way[1]. A further point is that a person's legal condition may be changed by events not under anyone's control, eg an accumulation of snow on his roof. A distinction accordingly needs to be drawn between liability, which is correlative to power, ie the jural relation; and what for present purposes may be termed 'subjection', namely, the position of a person which is liable to be altered by non-volitional events. This is not a jural relation.

Distinction between claim and power

On the face of it the distinction is obvious: a claim is always a sign that some other person is required to conform to a pattern of conduct, a power is the ability to produce a certain result. The 'right', for example, to make a will can be dissected into a liberty to make a will (there is another liberty not to make one), claims against other people not to be prevented from making one, powers in the sense of the ability to alter the legal conditions of persons specified in the will, and immunities against being deprived of will-making capacity. The power itself has no duty correlative to it. It would be incorrect to describe this as a 'right' in the testator correlative to the duty in the executor to carry out the testamentary dispositions, for the will takes effect as from death and the executor's duty only arises from that moment. When the testator dies his claims etc cease, so the duty cannot correlate to any 'right' in him.

The distinctions between claim, liberty and power are important for much the same reasons as those considered above. A complex illustration is *Pryce v Belcher*[2]. At an election the plaintiff tendered his vote to the defendant, the returning-officer, who refused to accept it. The plaintiff was in fact disqualified from voting on grounds of non-residence. It was held that he had exercised a power by tendering his vote, which imposed on the defendant the duty to accept it. The latter's refusal to do so was a breach of that duty, which might well have rendered him liable to a criminal prosecution. However, the plaintiff's power to impose such a duty did not carry with it either the liberty of exercising the power or a claim to the fulfilment of the duty.

18 Eg covenants in restraint of trade. See also *Thorne v Motor Trade Association* [1937] AC 797, [1937] 3 All ER 157; *Congreve v Home Office* [1976] QB 629, [1976] 1 All ER 697.

19 Eg limits on the liberty to picket: *Broome v DPP* [1974] AC 587, [1974] 1 All ER 314.

20 Cf Roman law, *D* 9.2.37 pr, 28.1.6. pr, 50.17.163.

1 Stone *Legal System and Lawyers' Reasonings* p 147, seems to assume that liability necessarily contemplates a change for the worse. That is not what Hohfeld meant by it.

2 (1847) 4 CB 866.

He, therefore, failed in his action against the defendant for the breach of his duty.

> 'Although a party in the situation of the plaintiff, has the power in this way to compel the returning-officer under the apprehension of a prosecution, to put his name upon the poll, he has not the right to do so [liberty]; that, in doing so, he is acting in direct contravention of the Act of Parliament, the terms of which are express that he shall not be entitled to vote; and that the rejection of his vote cannot amount to a violation of any thing which the law can consider as his right'[3].

In *David v Abdul Cader*[4] the defendant refused to exercise a statutory power to grant the plaintiff a licence to run a cinema. The Supreme Court of Ceylon rejected the latter's action for damages on the ground that an action presupposes violation of a 'right' (claim) in the plaintiff and that until the power had been exercised the plaintiff acquired no 'right'. The fallacy is clear. The 'right' which the plaintiff would have acquired on the exercise of the power is the liberty to run his cinema with appurtenant claims, powers, etc. The acquisition or non-acquisition of these is independent of the question whether the defendant was under a duty to exercise the power and whether there was in the plaintiff a claim correlative to *this* duty. The Judicial Committee of the Privy Council reversed the Supreme Court on this very ground and remitted the case for trial on those issues. Failure to observe the distinction between power and claim results in confusion, though this occurs less often than in the case of liberty and claim. Also, analysis does help to assess the case law. An example is *Ashby v White*[5], where the 'right' to vote was held to import a duty not to prevent the person from voting. The 'right' to vote is a power coupled with a liberty to exercise it, and the whole point was whether there was a claim not to be prevented. The decision in effect created such a claim, although the reasoning was fallacious. The Sale of Goods Act 1893 (now the Act of 1979), s 12 (1), introduces an implied condition that a seller of goods 'has a right to sell the goods'. It is clear from the context, which deals with conditions as to title, that 'right' here means 'power' to pass title. It was held in *Niblett v Confectioners' Materials Co*[6] that the defendant company had no 'right' to sell certain articles because a third party could have restrained the sale for infringement of a trade mark. This is a confusion between power and liberty. For, the fact that the defendants had power to pass title is independent of whether or not they had a duty not to exercise it (ie no liberty to do so).

Distinction between duty and liability

If X deposits or lends a thing to Y, there is no duty in Y to restore it until X makes a demand. Before such demand is made Y is under a liability to be placed under the duty. The demand itself is the exercise of a power. The distinction is important, for instance, in connection with the limitation of

3 Coltman J at 883.

4 [1963] 3 All ER 579, [1963] 1 WLR 834, on which see Bradley 'Liability for Malicious Refusal of Licence' [1864] CLJ 4. For a demonstration of how two disputants might have avoided needless confusion had they employed the Hohfeldian terminology of power, liability, immunity and disability, see Rostow 'The Enforcement of Morals' [1960] CLJ at 195.

5 (1703) 2 Ld Raym 938.

6 [1921] 3 KB 387.

actions. Thus, in *Re Tidd, Tidd v Overell*[7], where money was entrusted to a person for safe-keeping, it was held that the period of limitation only commenced from the time that a demand for restoration had been made. Again, a deposit of money with a bank amounts to a loan, and there is no duty to repay until a demand has been made. *Joachimson v Swiss Bank Corpn*[8] shows that time only runs from demand and not from the time of the original deposit. A sum of money can be attached under a garnishee order if there is a duty to pay, even though the actual time for payment may be postponed. In *Seabrook Estate Co Ltd v Ford*[9], a debenture holder appointed a receiver, who was to realise the assets and then pay off any preferential claims and the principal and interest to the debenture holders, and having done that, to pay the residue to the company. The judgment creditors of the company sought to attach a certain sum of money in the hands of the receiver before he had paid these other debts and which was estimated to be the residue that would be left in his hands. It was held that this could not be done as there was as yet no duty owing to the company. From this kind of situation must be distinguished those where there is a duty owing, but the performance of which is postponed. Such a debt can properly be the subject of attachment[10].

Distinction between duty and 'subjection'

If X promises Y under seal, or for consideration, that he will pay Y £5 on the following day should it rain, there is clearly no duty in X unless and until that event occurs. In the meantime X's position is simply that he is 'subject' to be placed under a duty. The distinction need not be elaborated further and may be dismissed with the comment that this is not liability to a power, but to a non-volitional event and, as such, forms the basis of much of the law of insurance.

An analytical problem arises with such a rule as *Rylands v Fletcher*[11] (under which an occupier has to pay for damage caused by the escape of a substance likely to do mischief) and the rule concerning animals (under which the 'keeper' has to pay for damage done by dangerous animals and trespassing cattle)[12], both of which do not involve fault. There seems to be a distinction between these cases, which are sometimes called 'strict liability' (but might preferably be styled 'strict subjection') and 'strict duties'. A duty prescribes a pattern of conduct, and by 'strict duty' (eg duty to fence dangerous machinery) is meant one to which the actor may not be able to conform no matter how reasonably he behaves in the circumstances. With *Rylands v Fletcher* and animals, the policy of the law is not to prevent people from keeping mischievous substances or animals, ie there is no duty not to keep them[13]. It could be argued, perhaps, that there are duties to prevent *escape*, in which case they would be correlative to claims; but this is not how the rules are

7 [1893] 3 Ch 154.
8 [1921] 3 KB 110. See also *Hampstead Corpn v Caunt* [1903] 2 KB 1; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833.
9 [1949] 2 All ER 94. See also *Tapp v Jones* (1875) LR 10 QB 591 at 592, especially.
10 See p 242, post.
11 (1868) LR 3 HL 330.
12 Animals Act 1971, ss 2, 4.
13 Cf the duty not to keep a live Colorado beetle and certain wild animals under the Dangerous Wild Animals Act 1976.

framed. What they say, in effect, is that one keeps these things at one's peril, ie liability attaches in the *event* of escape, which makes the position analogous to X having to pay £5 tomorrow if it rains. If so, there is no way of accommodating cases of 'subjection' within the Hohfeldian scheme, except to say that they are not jural relations and therefore are not entitled to a place therein.

Distinction between liberty and power

Buckland disputes the need for any distinction.

> 'All rights [liberties] are rights to act or abstain, not to produce legal effects. To say that he has a right that his act shall produce that effect is to imply that if he liked it would not have that effect, and this is not true. The act will produce the legal effect whether he wishes it or not. If I own a jug of water I have a right to upset it, but it is absurd to say that I have a right that the water shall fall out'[14].

It would appear that Buckland misunderstood the nature of the Hohfeldian power. It is not a 'right' that certain effects shall ensue. Acts that have certain effects are called powers, those that do not are not called powers. That is distinct from the liberty to perform or not to perform such an act. The distinction may be put as follows: the liberty to perform or not applies to all types of conduct, but considered with reference to their effects, it can be seen that some actions result in an alteration of existing legal relations, while others do not.

Rightful and wrongful powers

The significance of the distinction between the nature of the act and the liberty to do it may be demonstrated in this way. Sometimes a power may be coupled with a liberty to exercise it and a liberty not to exercise it, while at other times it may be coupled with a duty to exercise it. In both situations the exercise of the power may be said to be 'rightful'. When a power is coupled with a duty not to exercise it, such exercise would then become 'wrongful'.

Where a power is coupled with a liberty, a party cannot be penalised for having exercised it, or for not having done so. Thus, X may for no consideration at all give Y permission to picnic on his land. He may then change his mind with impunity and order Y to depart, ie exercise a power revoking Y's licence and imposing on him a duty to leave. If Y fails to do so within a reasonable time he commits a breach of that duty and becomes a trespasser. In *Clore v Theatrical Properties Ltd and Westby & Co Ltd*[15], Y had a liberty to be on X's land. X assigned his interest to A and Y assigned his interest to B. A exercised his power to revoke B's liberty. It was held that he could do so; since there was no contract between A and B, A was under no duty not to exercise his power, ie he had a liberty to do so. *Wood v Leadbitter*[16] is not

14 Buckland *Some Reflections on Jurisprudence* p 96.

15 [1936] 3 All ER 483. See also *Frank Warr & Co Ltd v LCC* [1904] 1 KB 713; *Chapman v Honig* [1963] 2 QB 502, [1963] 2 All ER 513.

16 (1845) 13 M & W 838. Little is left of this case since *Hurst v Picture Theatres Ltd* [1915] 1 KB 1, but the principle is sound.

exactly in point, for the plaintiff's liberty to be on the defendant's premises was created by contract. The defendant ordered the plaintiff to leave and, after a reasonable time, expelled him with reasonable force. The plaintiff did not sue in contract, though there was undoubtedly a contractual duty not to exercise the power, but sued for assault instead. It was held that, since he had become a trespasser, he could be ejected with reasonable force. It was held in *East Suffolk Rivers Catchment Board v Kent*[17] that the Board had a power and a discretion (liberty) as to its exercise. In *R v Board of Referees, ex p Calor Gas (Distributing) Co Ltd*[18], where a statutory power was coupled with a liberty to exercise it and also not to exercise it, the Divisional Court refused an application for an order of mandamus to compel the Board to exercise it[19]. On the other hand, in *David v Abdul Cader*[20], the Judicial Committee of the Privy Council thought that a *malicious* refusal to exercise a discretionary power might amount to a breach of duty; but this is a limit on the liberty.

Where a power is coupled with a duty to exercise it, ie no liberty not to exercise it, there is no question of any 'right' to do the act; the party 'must' do it. A simple example is the power and duty of a judge to give a decision. Generally the presumption is against there being a duty to exercise statutory powers[1]. The word 'may' in an empowering statute is usually taken to confer a liberty to exercise a power and not a duty, so mandamus will not lie[2]. At the same time, it was held in *Trigg v Staines UDC*[3] that a local authority cannot contract not to exercise a power of compulsory acquisition, ie it cannot deprive itself of the liberty to use its power by an opposite contractual duty. Where, however, there is a duty to exercise a power, a remedy will lie for a breach of it. In *Ferguson v Earl of Kinnoull*[4] damages were awarded for the refusal by the Presbytery to take a preacher on trial. In *R v Somerset Justices ex p EJ Cole and Partners Ltd*[5], the Divisional Court held that the statutory power of Quarter Sessions to state a case was coupled with a duty to do so in cases of conviction for crimes, but that in other cases there was only a liberty to do so. Mandamus lies in the former. Under s 17 of the Criminal Appeal Act 1968, the Home Secretary has the liberty to exercise his power to refer a criminal case to the Court of Appeal after the normal time limit for appeal has elapsed. Accordingly, in *ex p Kinally*[6] the Divisional

17 [1941] AC 74, [1940] 4 All ER 527.

18 (1954) 47 R & IT 92.

19 See, too, *R v Secretary of State for the Environment, ex p Hackney London Borough Council* [1984] 1 All ER 956, [1984] 1 WLR 592. Discretionary powers may be controlled as follows. (a) Abusive exercise may be held void: *Congreve v Home Office* [1976] QB 629, [1976] 1 All ER 697. (b) If reasons are given, the courts may inquire into their adequacy, eg if reasons are stated in a return to a writ of *habeas corpus* for the release of a person committed for contempt by the House of Commons. See also *Pilling v Abergele UDC* [1950] 1 KB 636, [1950] 1 All ER 76.

20 [1963] 3 All ER 579, [1963] 1 WLR 834.

1 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 225, 241, 245. The presumption may be displaced: *Re Shuter (No 2)* [1960] 1 QB 142, [1959] 3 All ER 481. See also *Cullimore v Lyme Regis Corpn* [1962] 1 QB 718, [1961] 3 All ER 1008.

2 *Re Fletcher's Application* [1970] 2 All ER 527n.

3 [1969] 1 Ch 10, [1968] 2 All ER 1.

4 (1842) 9 Cl & Fin 251; especially at 311; *David v Abdul Cader* [1963] 3 All ER 579, [1963] 1 WLR 834.

5 [1950] 1 KB 519, [1950] 1 All ER 264.

6 [1958] Crim LR 474 (decided under s 19 of the Act of 1907). For the creation of a duty by virtue of the degree of control conferred by a power, see *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 391, 403, [1972] 1 All ER 462 at 470, 480.

Court refused leave to move for an order of mandamus. Subject to certain other limits[7], mandamus generally lies where the duty is a 'public duty'. It is not easy to say what precisely a 'public duty' is[8].

Where a power is coupled with a duty not to exercise it, the party concerned has no liberty to do so. Thus, if a person has a liberty to be on premises by virtue of a contract, *Kerrison v Smith*[9] shows that the exercise of a power revoking the liberty is effective, although it amounts to a breach of the contractual duty. The case of *Pryce v Belcher*[10] has already been considered. Another example is that of a thief who sells a thing in market overt to an innocent purchaser for value. He exercises a power in that he deprives the owner of his title and confers title on the purchaser, but he is under a duty not to exercise this power and commits a fresh conversion by so doing. The simplest example is the commission of a tort: it is a power in that the legal positions both of the victim and of the tortfeasor are altered, but there is a duty, owed to the victim, not to commit the tort. Furthermore, the commission of a tort may operate as a power against a third party. Thus, a servant who commits a tort in the course of his employment alters the legal position of his master by imposing upon him the duty to pay damages vicariously and a liability to be sued therefor, but the servant concurrently owes a duty to his master not to exercise this power of imposing vicarious responsbility upon him for the breach of which the master can recover from the servant by way of indemnity what he has to pay to the victim of the tort[11] In all these situations the act of the party concerned is a power, for it alters the legal position, even though its exercise is a breach of duty. To call such powers 'rights' would be a misnomer, for it would amount to speaking of 'rights' to commit wrongs, ie breaches of duty. Though Hohfeld purported to distinguish between uses of the word 'right', it is clear that not all powers, in the sense in which he used that term, can be called 'rights'. This is hardly a criticism. The power concept is unobjectionable as power; it cannot always be brought under the umbrella of 'rights'; which only reinforces the case for the greater precision and scope of the Hohfeldian terminology.

Kinds of powers

Broadly, they may be divided into 'public' and 'private', but both involve ability to change legal relations. When a public power is coupled with a duty to exercise it, it is termed a 'ministerial' power; when it is coupled with a liberty, it is termed 'discretionary'. Public powers, though numerous especially in administrative law, cannot compete with the profusion of private powers. The appointment of an agent, for instance, is a power, for it confers on the agent further powers to alter the legal position of the principal and

7 Broadly, if there is no other more appropriate remedy: *Pasmore v Oswaldtwistle UDC* [1898] AC 387; *R v Dunsheath, ex p Meredith* [1951] 1 KB 127, [1950] 2 All ER 741. For careful discussion, see *Hughes v Henderson* (1963) 42 DLR 743.

8 Eg *Western India Match Co v Lock* [1946] KB 601, [1946] 2 All ER 227.

9 [1897] 2 QB 445; *Thompson v Park* [1944] KB 408, [1944] 2 All ER 477. See also *Wood v Leadbitter* (1845) 13 M & W 838. For a short discussion of the point, see Hutton 'The Remedy of an Ejected Licensee' (1954) 17 MLR 448. Power coupled with an implied duty not to exercise it: *Hounslow London Borough Council v Twickenham Garden Development Ltd* [1971] Ch 233, [1970] 3 All ER 326.

10 (1847) 4 CB 866, for which, see p 33-34 ante.

11 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125.

creates in the latter corresponding liabilities. A married woman has power to pledge her husband's credit for necessaries, in contract there is a power to make an offer and a power to accept, and innumerable others in contract, property, procedure and, indeed, in every branch of the law. Private powers may also be coupled with duties to exercise them, eg certain powers of trustees, or they may be coupled with liberties.

IMMUNITY-DISABILITY RELATION ('YOU CANNOT')

Immunity denotes freedom from the power of another, while disability denotes the absence of power. In *Hurst v Picture Theatres Ltd*[12], it was held that where a liberty to be on premises is coupled with an 'interest', this confers an immunity along with the liberty, which cannot therefore be revoked. The relationship between power, liability, immunity and disability may be explained as follows.

(1) If X has a power, Y has a liability. They are therefore 'jural correlatives'. A liability in Y means the absence of an immunity in him. Therefore, immunity and liability are 'jural opposites' (more strictly, 'jural negations', as previously explained).
(2) Conversely, the presence of an immunity in Y implies the absence of a liability in him. The absence of a liability in Y implies the absence of a power in X. Therefore, an immunity in Y implies the absence of a power in X, ie power and immunity are 'jural contradictories'.
(3) The absence of power could have been styled 'no-power', in the same way as no-claim, but Hohfeld preferred to give it the term disability. Power and disability thus become 'jural opposites' ('negations'). It follows from this that immunity in Y implies the presence of a disability in X, ie they are 'jural correlatives'.

Distinction between claim and immunity

An immunity is not necessarily protected by a duty in another person not to attempt an invasion of it. If X is immune from taxation, the revenue authorities have no power to place him under a duty to pay. A demand for payment is ineffectual, but X has no remedy against them for having made the demand. If immunity is the same as claim, there should be a correlative duty not to make a demand. In *Kavanagh v Hiscock*[13] it was held that the relevant section of the Industrial Relations Act 1971 (since repealed) conferred on pickets an immunity from prosecution or civil suit, but no liberty to stop vehicles on the highway and no claim not to be prevented from trying to stop vehicles. Secondly, there may be an immunity in X, which is protected by a duty in Y, but the claim correlative to that duty is not in X. Thus, diplomatic envoys are immune from the power of action or other legal process. Under an old law, since repealed, it used to be a criminal offence for any person 'to sue forth or prosecute any such writ or process' against

12 [1915] 1 KB 1 (although the plaintiff could have sued in contract, he sued in tort). See generally Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 118.

13 [1974] QB 600, [1974] 2 All ER 177.

them[14]. As pointed out earlier, even if there are claims correlative to duties in criminal law, they are not in the persons for whose benefit the duties exist. Finally, an immunity in X may be protected by a duty in Y and the claim correlative to the duty may also be in X, as in the case of the malicious presentation of a petition in bankruptcy[15]. The failure to distinguish between 'right' in the sense of claim and immunity may be at the root of *Dowty Boulton Paul Ltd v Wolverhampton Corpn*[16]. In 1936 the corporation conveyed to the company a plot of land for 99 years for use as an airfield, and the corporation undertook to maintain it for use by the company. In 1970 the corporation purported to revoke the company's interest in the land. It was held that although the corporation was not entitled to override the company's interest in the land, the latter's only remedy lay in damages and not in an injunction. The effect of the 1936 conveyance would appear to have been to grant, *inter alia*, a liberty to the company; and if the corporation was unable to determine that interest, then that liberty seems to have been coupled with an immunity against revocation. The court refused an injunction on the ground that to issue one would amount to compelling the corporation to fulfil its obligation to maintain the airfield, ie be equivalent to an order for specific performance. It is here that the confusion lies. The 'right' of the company, which the court held could not be overridden, was its liberty plus immunity; but the 'right' correlative to the duty to maintain the airfield was its contractual claim. Breach of this duty is remediable by damages, but the question whether an injunction could be issued to support the immunity ought not to have been related to compelling performance of the contractual duty.

Distinction between liberty and immunity

The position of a diplomatic envoy illustrates this. Such a person is treated as being capable of committing a breach of duty and is under a duty to pay damages, although immune from the power of action or other legal process to compel him to do so. In other words, he has no liberty to do the act, nor a liberty not to pay damages for it, but he has an immunity from process all the same. It was held in *Dickinson v Del Solar*[17] that the fact that an envoy was thus under a sanctionless duty to pay damages was sufficient to involve his insurance company in responsibility. If, on the other hand, he voluntarily pays the damages, he cannot recover them, since there is the duty to pay.

EVALUATION OF HOHFELD'S ANALYSIS

Hohfeld's work has earned as much criticism as praise. One set of criticisms is to the effect that some of Hohfeld's conceptions are without juridical significance, for instance, liberty, liability and disability[18]. The answer, as Hohfeld's editor has pointed out, is that liberty is necessarily related to the other concepts in the first square of the table, and liability and disability are similarly related to the other concepts in the second square[19]. With regard to

14 Diplomatic Privileges Act 1708, s 4 (repealed and replaced by Diplomatic Privileges Act 1964).
15 *Chapman v Pickersgill* (1762) 2 Wils 145.
16 [1971] 2 All ER 277, [1972] 1 WLR 204.
17 [1930] 1 KB 376; and see more fully p 243 post.
18 Pound 'Legal Rights' (1916) 26 International Journal of Ethics 92 at 97.
19 Cook 'Introduction' to Hohfeld pp 9–10.

liberty the objection has been considered[20]. With regard to liability and disability, it should be pointed out that once the concept of power is admitted, the others must follow. A power in X to alter the legal condition of Y implies that Y is liable to have his condition altered; if X has no power (disability), then Y is immune.

Kocourek objected to no-claim on logical grounds[1]. That which is not a claim, he observed, could be 'an elephant, a star or an angel'. This is unfair, for it proceeds on the basis of something that Hohfeld never implied. To Hohfeld no-claim simply denoted the position of one who is not in a position to demand the performance of a duty. To allege that it could be 'an elephant' misses the point. Liberty, be it noted, is just as negative as no-claim, the gist of it being no-duty. So, too, immunity and disability might just as well be called no-liability and no-power respectively. Yet, Kocourek was prepared to accept these.

Secondly, various allegations have been made that Hohfeld's analysis was incorrect and incomplete in places. There is truth in this, and many critics have done constructive service in removing the errors. It should be remembered that Hohfeld himself would very likely have corrected these had he lived to revise his work. His premature death was a loss, for the form in which his work is to be found is not that in which he hoped to have left it[2]. It has been pointed out that it requires some straining of language to bring wrongful powers under the label of 'rights', which is not an objection to Hohfeld's analysis of power, but rather to the association of power with 'right'. Non-correlative duties and 'subjections' (as distinct from liability) do not fit into the scheme, but these can be explained on the ground that they are not jural relations, which is what the scheme purports to portray. They reveal its limitations all the same. It has also been objected that the power concept needs greater refinement. On the one hand there is 'capacity' possessed by individuals, eg to make wills, contracts etc; on the other hand there is 'authority' conferred on specially qualified individuals or bodies in special circumstances. While it is true that the exercise of both results in changing jural relations, the categories are so different that they should not be grouped together.

Thirdly, there is the objection that the terminology is unusual and that it is unrealistic to expect the profession to make so radical a change in its vocabulary. The day when the House of Lords will be talking of no-claims is remote, but what is important is not the *words*, but the *ideas* which they represent. One may *think* Hohfeld without *talking* Hohfeld. One can utilise the analysis to keep one's mind clear when grappling with problems, and may then state the result in any other terms. It is not unimportant to note that the American Restatements have adopted Hohfeld's vocabulary as their medium of expression.

Fourthly, there is the objection that the terminology is not unusual enough. Critics, while applauding the effort to dispense with the homonym 'right', have shown that some of the terms which Hohfeld chose are just as ambiguous, that they are, to use a homely phrase of Dr Oliver 'earmarked for other conceptions'. The objection is not fatal. Hohfeld did his best to

20 See p 31-32 ante.

1 Kocourek 'The Hohfeld System of Fundamental Legal Concepts' (1920) 15 Illinois Law Quarterly 23 at 24, 26 et seq.

2 *Hohfeld* p 64, n 100.

provide synonyms for his terms, and other writers are free to improve the terminology as they think best.

Fifthly, valuable as Hohfeld's work is in distinguishing between claims, liberties, powers and immunities, it is convenient and necessary to retain a general concept of 'right' to denote institutions, such as ownership or possession[3]. Thus, an owner and his bailee have claims etc in relation to the thing bailed, but the interest of the former is distinguished from that of the latter by the 'right of ownership', which carries with it the claims etc[4]. Also, as will appear later, such phrases as 'right to possess' and 'better right' in a thing expresses the general idea of entitlement, which cannot be conveyed adequately if it were reduced to specific claims etc. Such expressions are convenient and do not mislead.

Lastly, the decisive question concerns the utility of the scheme. Cases which accord with Hohfeld's analysis, so the argument might run, were in fact decided without the aid of his scheme. The scheme is therefore superfluous. If, on the other hand, a case is not in accord with the scheme, then the scheme should be altered; for is not case law the criterion by which any theory is tested? Only a superior tribunal can say that a case was wrongly decided. To this kind of argument the answers would be as follows. The first step is to see what justification there is for adopting the Hohfeldian distinctions. It is submitted that they are borne out by such an abundance of case law as to justify their acceptance as a basis for an appraisal of individual decisions. Just as an established line of authority is not discarded as soon as the first aberrant decision turns up, so too the occasional decision not in accord with the Hohfeldian scheme should not of itself be taken as discrediting it. Secondly, it could be of use in assessing the precise effect of an aberrant decision without condemning it as wrongly decided. Thirdly, sometimes, however, it may be permissible to argue that such a decision was indeed wrongly decided as when an appellate court is invited to overrule it. Hohfeld's analysis may furnish reasons why it should be regarded as incorrect. Fourthly, the use of the analysis will enable the law to be developed more in accordance with existing principles and less through exceptions. Fifthly, the analysis is of value in understanding the law. Sixthly, it is an aid to distinguishing. Finally, it is an aid to clear thinking and invaluable as a mental training. Although the hopes that were once entertained of startling achievements with the aid of the scheme have not been realised, yet its value and utility as an aid to clear thinking have been proved.

It is important to apply the Hohfeldian analysis to social and political slogans such as 'Fundamental rights', 'rights of Man', 'Women's rights', 'Prisoners' rights', 'Animal rights', 'Workers' rights' and so forth. As such these are ridiculous bases for serious action. Is a particular campaign launched for claims, liberties of action, powers, or immunities; in whom; in what circumstances; when; where? The point may be illustrated by taking

3 See eg *Re Sykes, Skelton and Dyson v Sykes* [1940] 4 All ER 10, where it was held that a bequest of 'all my ... horses' was not apt to convey the interest which the testator had as a tenant in common of three horses. If ownership is no more than a bundle of claims etc, there is no reason why the testator could not pass his half of the bundle. The language of the judge (at 12) suggests that a mere 'collection of rights' is not equivalent to the idea conveyed by the expression 'the testator's horses'. For a different explanation, see REM in (1941) 57 LQR 23.

4 Honoré 'Rights of Exclusion and Immunities against Divesting' (1959-60) 34 Tulane LR at 456-458.

one of these, 'Workers' rights'. On analysis, it can be seen that one aspect is the claim-right to be given jobs, correlative to a duty in the state to provide them, which deserves sympathy in a climate of unemployment. Next, there is the assertion of an unrestricted liberty-right not to work at the jobs, which are claimed 'as of right', ie the liberty to strike. Side by side with this is the assertion of an unrestricted liberty-right to prevent other workers from working at their jobs by picketing. There is also the assertion of a power to drive workers out of their jobs through the closed-shop doctrine. There is the assertion of immunity from suits in courts of law and immunity from having these various liberties and powers curtailed or abolished. Finally, there is a claim-right to at least some kind of regular payment for workers even while they are not working through various welfare benefits. Any discussion of a legal framework for industrial relationships should surely begin with precise analysis of the different concepts that are involved.

TEMPORAL PERSPECTIVE OF THE HOHFELDIAN SCHEME

The difference between the first square and the second is that the former concerns jural relations at rest, the second with changing jural relations. Of the eight concepts in the scheme, two stand out as the key concepts, one in each square. They are duty and power, the others in their respective squares being only derivatives. Duties regulate behaviour, while powers create, repeal or modify duties and other relations. Professor Hart has unerringly fastened on these two to provide him with the centrepiece for his concept of law, which will be considered later[5].

A point of significance is the relationship between the squares. Each depicts jural relations of correlation, opposition and contradiction as they are to be found presently. The relationship between the squares requires a temporal perspective. Thus, a power and, eg the claim-duty relation created by its exercise, cannot co-exist; the former is anterior to the latter[6]. It has been shown how a power may co-exist with a duty to exercise it, or not to exercise it, but this is the concurrence of two independent jural relations. The situation now being considered concerns the relationship between a duty and a power where the duty has been *created* by the power. If one focuses on the power, the claim-duty relation is in the future; if one focuses on the claim-duty relation, the power which created it is in the past. For instance, there is a power to make an offer and a power to accept it, and once they have been exercised they give rise to a contractual claim-duty relationship. When the contract comes into being, the offer and acceptance are finished and done with. It would be incomplete to take account only of the power and lose sight of the claim-duty relation, or to take account only of the latter and lose sight of the creative power. In order to get both into focus a temporal perspective is necessary. Indeed, 'the law', as commonly understood, is as much concerned with powers as with the jural relations they create. Thus, the 'law of contract' deals with powers to create claim-duty relations as well as the claim-duty relations themselves, which are labelled as different kinds

5 See pp 351-356 post.
6 Hall *Foundations of Jurisprudence* pp [illegible]

of contracts. Accordingly, it is submitted that in order to see the working of the Hohfeldian table a temporal perspective is essential.

OTHER VARIETIES OF LEGAL MATERIAL

Means of achieving legal ends

Certain provisions prescribe how certain ends are to be achieved. Thus, a gratuitous promise must be made under seal, a vote at an election must be exercised by marking a cross at a certain spot on the ballot paper. These resemble duties in that they prescribe what a person ought to do, but they are not duties. They are conditions regulating the effective exercise of powers. The consequence of non-compliance with such directions is that the transaction is null and void. Austin argued that nullity is a sanction and that therefore there is a duty to put the seal etc[7]. The matter was well discussed by Buckland[8]. The question is, Who comes under the duty in these cases? In the example of the gratuitous promise, the duty to put the seal cannot be on the promisee, who need know nothing about it. If there is a duty at all, it must be in the promisor, in which case it is odd that the penalty for non-compliance is that he is not bound by his promise. Secondly, a duty usually has a correlative claim. If there is a duty to put the seal, the claim correlative to it cannot be vested in the promisee, since he only acquires his claim after the seal has been affixed. Nor can it be in the promisor, for it makes no sense to say that he has a claim against himself. (This argument is not, perhaps, strong since, as has been indicated, duties need not always correspond with claims). Thirdly, the major premise of the argument that these are duties because nullity is the sanction, breaks down if sanction is rejected as a test of duty[9]. Fourthly, these rules prescribe how a person can achieve some result for himself rather than what he ought to do for others. The imperative 'must' should not mislead[10]. Thus, 'if you want to talk to X by telephone you ought to (must) ring him up'. This is hardly a duty; it is simply the effective way of bringing about the desired result. It is clear, therefore, that 'ought' here is being used in a different sense from the 'ought' of duty[11]. Finally, the 'ought' behind duty is normative and is not derivable from an 'is' of fact; the 'ought' in the kind of provision under discussion is so derived. For instance, fire burns and throws out heat; therefore, the statement that if one wants to get warm, one ought to/must light a fire is derived from the nature of fire. It is not prescribing a duty to light the fire. Similarly, the provisions being considered only specify the means of achieving certain ends.

The means-to-an-end connection is significant in other ways. For instance,

7 Austin *Lectures on Jurisprudence* I, p 505.

8 Buckland *Some Reflections on Jurisprudence* pp 91–92.

9 As to which, see pp 236 et seq. post. Hall substitutes 'privation' for 'sanction': *Foundations of Jurisprudence* pp 104 et seq; p 238 post.

10 Imperative language is not conclusive: *Re Philpot* [1960] 1 All ER 165, explaining *R v Dickson* [1950] 1 KB 394, [1949] 2 All ER 810.

11 *Caldow v Pixell* (1877) 36 LT 469 at 470; *E Ramia Ltd v African Woods Ltd* [1960] 1 All ER 627, [1960] 1 WLR 86; but it is possible for a condition precedent to consist of the performance of some other duty: *Mungoni v A-G of Northern Rhodesia* [1960] AC 336, [1960] 1 All ER 446.

law could be regarded as the application of force conditional on behaviour of a certain kind: 'If a person does X, then punishment Y ought to be visited on him'[12]. This way of looking at it makes the legally approved behaviour the means of achieving the desired end of avoiding punishment. There is, of course, an alternative view, namely, that there are two separate prescriptions here, one prescribing what a person ought, or ought not to do, the other prescribing the punishment for breach of the prescription[13]. Which of these two interpretations is preferable will be discussed later. Further, to take up a point made at the end of the last chapter, when a legal system is considered in a continuum, as it should be, the conditions necessary to its continuity and functioning become part of the concept by virtue of the means-to-an-end connection: such conditions are means of achieving continuity and proper functioning.

Definitions

It is statutorily provided, eg that the word 'person' shall include a corporation, and according to the common law a simple contract is constituted by offer, acceptance and consideration. These and numerous other definitions lay down the legal use of certain terms. It is arguable that a judge, or other official, is under a duty to attach the appropriate label and act accordingly once the requisite conditions are fulfilled, but the specification of the conditions themselves is not a duty but definition.

Location of legal relationships

A different kind of rule determines the incidence of jural relations. For instance, on an intestacy various claims arise in persons entitled to share in the deceased's property and there are duties of administration correlative to them. It is a special kind of rule that lays down that a claim vests in the first instance in X, or failing him in Y, and that the duty of administration shall vest in A. The same applies to the incidence of the duty of supporting an illegitimate child[14]. All such rules help to structure a legal system.

Principles, doctrines and standards

No one disputes that strict and full responsibility are part of the law, nor does anyone doubt that notions such as privity of contract, *mens rea*, presumption of innocence, unjust enrichment, *ex turpi causa non oritur actio* are also part of law. The well-known maxims of equity are the roots from which a crucial body of law has grown up. In the law of tort damages are payable for failure to show reasonable care, or failure in certain circumstances to see that such care was taken by another, or failure to show special skill where this had been professed. What is the status of these and others like them? They do not create jural relations or indicate their location, nor are they

12 Sp Kelsen, as to which see pp 359 et seq. post.

13 So Bentham, p 340 post.

14 A good example from Roman Law is that when a contract was made by a slave or child under paternal power, the civil law vested only the claim against the other contracting party in the father, not the duty. Praetorian law vested a duty, but not necessarily to the full extent of the other's claim.

means to ends or definitions. Professor Dworkin contends that they stand in a category of their own and refers to them as principles, doctrines and standards[15]. He says that they operate differently from rules of law, which, according to him, apply in an all or nothing fashion, whereas these have a dimension of weight and operate persuasively by exerting pressure on the law to develop in their direction. The 'all or nothing' character of rules is perhaps an overstatement, for rules do admit discretion as to how they are applied and, indeed, some expressly allow a judge, eg to make such order as he thinks fit, or to reduce damages in proportion to his assessment of a plaintiff's contributory negligence. The discretion in the application of rules is guided by a host of considerations[16] among which principles, doctrines and standards play an important part. These are distinguishable from other value considerations in that, whereas a good many values are non-legal, these do possess law-quality. This brings up another of their distinguishing features, which is that they do not acquire law-quality through statute, precedent or custom. The presumption of innocence, for instance, was never formally enunciated, nor were the maxims of equity, while the privity of contract doctrine ante-dates English law. They are 'law' because courts accept them as such and they are, therefore, part of legal material.

15 Dworkin 'Is Law a System of Rules?' in *Essays in Legal Philosophy* (ed Summers) p 25; *Taking Rights Seriously* chs 2 and 3. See, however, Tapper 'A Note on Principles' (1971) 34 MLR 628; Coval and Smith 'Some Structural Properties of Legal Decisions' (1973) 32 CLJ 81; 'The Causal Theory of Law' (1977) 36 CLJ 110; Steiner 'Judicial Discretion and the Concept of Law' (1976) 35 CLJ 135; Smith *Legal Obligation* ch 9.

16 See ch 10 post.

READING LIST

W W Buckland *Some Reflections on Jurisprudence* pp 92–110.

W W Cook 'Introduction' to Hohfeld's *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed W W Cook).

A L Corbin 'Legal Analysis and Terminology' (1919–20) 29 Yale Law Journal, 163.

R M Dworkin 'Is Law a System of Rules?' in *Essays in Legal Philosophy* (ed R S Summers) p 25.

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W N Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed W W Cook) ch 1.

R Pound 'Fifty Years of Jurisprudence' (1936–37) 50 Harvard Law Review 571–576.

M Radin 'A Restatement of Hohfeld' (1938) 51 Harvard Law Review 1141.

J Stone *Legal System and Lawyers' Reasonings* ch 4.

G L Williams 'The Concept of Legal Liberty' in *Essays in Legal Philosophy* (ed R S Summers) p 121.

CHAPTER 3

Rules, laws and legal system

The varieties of legal material discussed in the last chapter did not include 'rules of law' or 'laws' even though these expressions are among the commonest in legal talk. Their exclusion seems odd at first sight, since one would suppose that they comprise the very stuff of the law. The reason will appear on an examination of 'rule' and 'a law'.

RULES

'Rule' connotes a standard by which to judge conduct, or on which to base one's own conduct. All the kinds of legal material that have been discussed share this rule-quality directly or indirectly. A duty is always a pattern of behaviour that serves as a general standard with reference to which deviance is condemned as being wrong, not just incorrect; means of achieving legal ends are 'standard' procedures for the effective exercise of certain powers; the requirements stipulated in definitions are the bases on which those concerned proceed when using terms; locations of jural relations similarly require such persons to proceed on the basis that claims, duties etc vest in certain parties and not others. The 'rule-ness' of principles, doctrines and standards is self-evident.

Three questions arise: (1) How did the words 'rule' and 'law' come to be associated with 'standard'? (2) What does 'acceptance' of standards mean? (3) How do they come to be accepted?

Association of 'rule' and 'law' with 'standard'

The details of what is a fascinating development lie in the history of Roman Law and have to be sought elsewhere[1]. The story in broad outline is that *lex* (law) meant declared law (derived from *lego*, I declare) as opposed to *jus*, which was customary law crystallised out of decisions. In the course of time *leges* became expressions of popular will through enactment by the assemblies and their function was prescriptive like modern legislation and ceased being declaratory of *jus*. The term *regula* (rule) came in via the Grammarians for whom it connoted 'guide' or 'standard'. One of the most distinguished jurists of the early Principate, Labeo, a Grammarian turned lawyer, pioneered the use of *regula* for certain legal axioms which had prescriptive function. The association of *regula* with *lex* evolved some time during the second century AD via imperial decrees, which had taken over the role of *lex*. During this period Rule Books, *Regulae*, named after the jurists who had been commissioned to prepare them, were issued under imperial authority to subordinate officials as manuals for their guidance. These *regulae* thus had the force of *lex*.

1 Stein *Regulae Juris*.

The *regulae*, which had been worked out privately by certain of the great jurists during the second and third centuries AD, the Classical period of Roman Law, were later officially invested with the force of *lex* by the Law of Citation in AD 426. Finally, Justinian's *Digest*, which codified much of the writings of the Classical jurists, was itself promulgated as a *lex* by the emperor. It is significant that the finale of this monumental work, its concluding Title, Book 50.17, consists entirely of a collection of *regulae*. The association of 'rule', 'law' and 'standard' was thus gradually completed and has formed the basis of legal thinking ever since.

Acceptance of standards

The concept of 'rule' has been examined by Professor Hart whose explanation rests on the distinction between what he calls the 'external' and 'internal' points of view[2]. The former is the point of view of an outside observer, who simply describes behaviour as he sees it: people do in fact behave in such and such a way. The latter is the point of view of a person, who treats the behaviour as a prescriptive pattern of how he and others ought to behave, in other words, he 'internalises' it. Internalised patterns of behaviour are expressed, not just descriptively as the external observer would do, but in terms of 'ought', 'must', 'should'. Conformity is said to be 'right' and non-conformity 'wrong'. The point is not whether people do or do not conform, but that they ought to do so. Internalisation moves from the realm of the 'is' of what happens in fact (*Sein*) into that of the 'ought' (*Sollen*).

The characteristic of a rule, says Professor Hart, lies in internalisation, ie acceptance of a behaviour pattern as a standard. He distinguishes 'rule' from 'habit' in that habits only involve shared behaviour, which is not enough for rules; nor do habits serve as standards. 'Rule' is also said to be at the root of the notion of 'obligation', and here he distinguishes between 'being obliged' and 'having an obligation'. If a gunman claps a pistol at X's head, X may feel obliged to yield his purse, but he has no obligation to do so. Having an obligation results from a rule to that effect; and clearly there is neither rule nor obligation that X should surrender his purse[3]. Professor MacCormick further distinguishes between two forms of internalisation[4]. One is understanding the standard accepted by an actor with a view to explaining what he does and how he does it. Judgment is passed on his skill in acting correctly and deviations are condemned as incorrect. The other form is acceptance of a standard according to which people ought to act and deviations are condemned as wrongdoing. A further distinction might be drawn between internalisation by citizens and by officials. Citizens accept a behaviour pattern as a standard for themselves, but they do not also internalise a duty to pass an official judgment on the conduct of others. Officials do both; they accept it as a guide for their own conduct and also accept a concomitant duty to apply it when judging the conduct of others officially.

There are many rules in society prescribing how people ought to behave, but not all of them are internalised as 'law'. There are, for example, accepted rules in various sports, rules of etiquette, morals and so on. As previously

2 Hart *The Concept of Law*, *passim*.
3 Hart pp 80 et seq. For 'obligation' see pp 228-229 post.
4 MacCormick *Legal Reasoning and Legal Theory* pp 274 et seq.

indicated, legal rules are distinguished from others with reference to the criterion, or criteria, of validity, which in this country are statutes, precedents and immemorial customs. Rules emanating from the criterion of validity are internalised as rules of law because the criterion itself has been internalised as law-constitutive, a point which will be discussed presently.

If 'having an obligation' results from a rule of law, then 'having an obligation', too, is a matter of law. Underlying this there is a moral substratum of 'having a sense of obligation', which is not congruent with the acceptance of either a legal rule or obligation. Thus, a rule of law may forbid a certain action, which is internalised by a person to the extent that he acknowledges a legal obligation. If he has no sense of obligation with regard to the conduct in question, he may well be inclined to disobey. Every motorist acknowledges that to abide by speed limits is a legal obligation, but vast numbers of them have no sense of obligation with regard to it, which is why the law is disobeyed during every minute of every day. The imposition of a legal duty and the creation of a legal obligation are not the end, for there always remains the underlying moral liberty to obey or disobey; and it is a sense of obligation that inhibits disobedience. A different illustration comes from cases where the law leaves people with liberties to act or not as they please, ie without constraining duties either way. Freedom of action can be exercised abusively or responsibly. Since the law does not restrain, any restraint on liberty cannot come from law. It can only derive from a moral sense of obligation based on the acceptance of moral rules. The distinction between law and morals and between 'having an obligation' and 'having a sense of obligation' is important, but it is even more important that their relationship should not be left out of account. Law without a sense of obligation is unworkable, which means that any discussion of law as a functioning phenomenon has to include this moral dimension.

How do standards come to be accepted?

It is an obvious progression to pass from the acceptance of standards to how and why they come to be accepted. Not only do these questions naturally arise, but they also open up other aspects of 'rule'. Many reasons, moral, social and historical, lie behind the acceptance of standards and these, of course, vary from country to country. They are inextricably interwoven into the 'rule-ness' even of rules of law and it would be arbitrary to cut off the examination of rule at this point. As contended in Chapter 1, the jurisprudential study of legal phenomena cannot be divorced from their social and cultural milieu.

One reason for the acceptance of a rule as a standard lies in its appeal to a sense of moral rightness. This does not apply to every rule, since some are morally neutral, but it is true of others. In bygone days when the pronouncements of a supreme lawgiver were accepted because of his charismatic authority, this derived from trust in his moral sense, often believed to have been divinely inspired, as with Moses and the Ten Commandments, Themistes in Homer, or the Dooms of the Anglo-Saxons. On a more prosaic level, the influence of imitation, the herd instinct to follow what others do, should not be overlooked. The fact of compliance by others exerts psychological pressure on individuals to follow suit, which may stem from reluctance to appear egregious, or from an unthinking assumption that a thing is done because

must be right[5]. Allied to this is the pressure exerted by the traditions and craftsmanship of specialist callings, which have been evolved over long periods of time, and those who enter these vocations accept the rules regulating the practices and ways of going about the jobs[6]. Perhaps the most sophisticated basis of acceptance is reason, which is the judgment of a person who weighs up the pros and cons and concludes that it is in the wider interest to conform, even against his own interest and inclination.

Something more has to be said about acceptance of rules for reasons which are compendiously means of achieving desired ends. In primitive societies a range of activities was regulated by ritual, and rules of ritual were accepted because they were believed to be means towards achieving various ends, such as abundant harvests, rain in times of drought and so on. This came about through belief in word-magic, ie the power of words to influence the material world.

Word-fetishism is a habit that is easily formed[7]. The natural reaction of a baby in its earliest days to discomfort, for instance, is to utter a sound. When sound is uttered, in the majority of cases the offending situation is rectified. The baby's limited appreciation of cause and effect can only register the broad fact that sound succeeded in bringing about an alteration in the world of fact. Food appears, discomforts disappear and persons materialise[8]. As the child grows older it is made to realise that not every time it makes a noise is it going to get its own way. Deep down, however, there remains that unshakeable conviction that sound does have power; obviously, it cannot be any and every sound, but only certain special (magic) sounds. The ground for belief in word-magic is thus prepared very early and during the most receptive period of consciousness. In so far as law gives a person power to control property as well as the actions of other persons, it is not surprising that it should have become associated with word-magic from the earliest times. Nor is it surprising that the earliest exponents of law were priests. To put the machinery of law into operation the proper ceremonial has to be observed and the proper incantations uttered. Adherence to the rules of ritual is to be found in every system and traces remain today. People outgrow it and find ways and means of circumventing it. New uses are found for the original forms and this, together with an element of conservatism, combine to keep formality and ritual alive long after the inner belief in word-magic drops out[9].

Another form of internalisation of rules of behaviour as means to an end lies in the inter-dependence of people in society. As social existence develops and becomes more complex, it evolves a network of interlocking practices so that the activities of individuals, or groups of them, come to depend more and more on the activities of others, so much so that if one group refuses to play its role, other groups are stricken into impotence, or at least

5 For imitation, see Tardè *Les Lois de L'Imitation* (trans Parsons).

6 See eg Llewellyn *The Common Law Tradition. Deciding Appeals*, and pp 454-455, 456-459 post.

7 Ogden and Richards *The Meaning of Meaning* ch 2; Ogden *Word-Magic;* Malinowski Supplement I to *The Meaning of Meaning* pp 318-326; Malinowski *Argonauts of the Western Pacific* pp 408 et seq. See also p 462 post.

8 There is a strong connection between the earliest syllabic sound uttered by a baby, *ma*, and the person most prominent in its world, the mother, which may be the reason why *ma* is the common root in a great number of languages of the various words for 'mother'. Malinowski Supplement to *The Meaning of Meaning* p 320.

9 Olivecrona *Law as Fact* (1939) p 116.

inconvenienced. One has only to reflect on the extent to which the daily work and existence of individuals depends on others providing water, heat, food, clothing, housing, transport etc in order to appreciate this[10]. The result is that considerable pressure builds up on people to conform to their roles so as not to unsettle others, which thereby leads to acceptance of conformity to roles in order to achieve smooth co-existence as 'right' and non-conformity as 'wrong'. A good many interlocking practices do crystallise into laws.

A more subtle manifestation of the means-to-an-end connection is the acceptance of a rule as a means of avoiding the unpleasant consequences of non-compliance. A distinction has to be drawn between internalisation of the rule as such and the decision by a particular individual whether or not to obey it in a given situation. The latter aspect does not relate to the matter under discussion, but it needs mention in order to get it out of the way. With regard to disobedience, the influence of fear in inhibiting such acts should not be over-estimated. It does not work uniformly and in all circumstances. Disobedience by officials acting officially can probably be more easily detected and punished than disobedience by ordinary people, so fear of punishment may operate more strongly on the former than on the latter. Even with the latter the influence of fear depends on being caught. It plays no part when the violation of a rule is unintended; but even where it is intended, fear is balanced against the chance of escape, severity of the punishment and so on. All this does not relate to internalisation of rules, but only to obedience of rules already internalised. The way in which fear could lead to internalisation of rules depends on the law being administered firmly and successfully over a long period and the process has been explained by Professor Olivecrona[11]. Fear of unpleasant consequences, he says, does not of itself make a rule; if so, there would be a rule forbidding people to put their hands into the fire. Internalisation of a rule as a result of fear is an indirect and long term consequence. He points out that everyone is aware from his or her infancy of the consequences of breaking laws, domestic in the earliest instance, and the temptation to transgress brings into play this fear of punishment. It is not in the human make-up to accommodate such tension indefinitely, and fear tends to be removed by a psychological adjustment, which accepts conformity as a means of getting rid of it, which then disappears from the surface as a motive. Not only legal rules, but also moral ideas are shaped by the ever-present pressure of legal enforcement[12]. Other people have expressed the same idea. Plato and Aristotle drew attention long ago to the educative function of law; indeed, the latter said, 'Legislators make citizens good by forming their habits[13]. More recently, Lord Simon of Glaisdale observed, 'I would only add that it seems also to have been within Parliamentary contemplation that the law might perform in this field one of its traditional functions, an educative one - namely, to raise moral standards by stigmatising as henceforward socially unacceptable certain hitherto generally condoned conduct[14]. Two jurists said much the same: 'The threat of sanction can deter people from violating the law, perhaps in an important

10 Cf, Duguit *Law in The Modern State* (trans Laski) see pp. 436-439 post.

11 *Olivecrona* (1939) pp 147-148; (1971) pp 271-273. See also Lundstedt *Superstition or Rationality in Action for Peace?* Introduction; Tsanoff in 'Round Table Discussion' (1952) 1 Journal of Public Law at 268.

12 *Olivecrona* (1939) p 153.

13 *Ethics* II, 1.5.

14 *Charter v Race Relations Board* [1973] AC 868 at 900, [1973] 1 All ER 512 at 527.

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part by inducing a moralistic attitude towards compliance'[15]. Perhaps, the outstanding contemporary example of such an enterprise is that of the Soviet Union, which has been attempting to use laws to educate the masses in the values of communism[16]. This is a gigantic undertaking which will no doubt take time, and may explain why the authorities are so zealous in preventing contacts other than carefully vetted ones between Soviet citizens and the non-communist world.

Valuable as Professor Olivecrona's insight is, it should not be taken too far. Not all moral ideas are shaped by legal enforcement, but, even when they can be, there may be difficulties. One is that the process requires settled conditions and is unworkable in a state of flux. Another is that deep-seated attitudes are peculiarly resistant to re-moulding in this way, especially when the law seeks to go against what large sections of the community like or believe to be right; which is why terror regimes are unlikely to succeed in the long run. In these cases the psychological reaction is to throw up a barrier not only to the influence of laws, but even to propaganda. Thus, the de-segregation laws in America made very little headway in the racially-minded southern States, while even the South African government has occasionally been caught in its own toils. Having used law, amongst other methods, to create the feeling that *apartheid* is morally right, some of its own more liberal laws and policies have thereby been frustrated[17]. The solution to the problem of how such attitudes are to be changed is not yet insight.

Perhaps the most interesting psychological factor behind internalisation is the pressure exerted by the mere fact that the proposition in question possesses the quality of 'law'. To say that such and such is 'law' is to strike an attitude towards it and to evoke one. Professor Olivecrona has examined this too and shows that this feeling derives from the prior internalisation of the institutions and procedures of law making. As soon as one is told that this or that is in an Act of Parliament, judicial precedent or immemorial custom, one accepts it as a rule of law without even knowing of its content. This is coupled with the fact that texts produced by these agencies are published through certain media, eg gazettes, which have associations built round them that what they contain is true[18]. The inquiry thus gets pushed a stage further back into the reasons behind the internalisation of the law-making institution, namely, the criterion of validity. For instance, even if the reigning monarch makes a declaration with the unanimous assent of all the members of both Houses of Parliament assembled at a garden party, that will not have the quality of 'law' nor exert the same pressure as when the established constitutional processes of legislating have been gone through.

> 'Constitutional law-givers gain access to a psychological mechanism, through which they can influence the life of the country ... the significance of legislating is not that the draft acquires a 'binding force' by being promulgated as a law.

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15 Schwarz and Orleans, 'On Legal Sanctions' (1966-67) 34 U Ch LR at 300.

16 See p 414 post. Cf. the South African *apartheid* legislation which helps to create the feeling of the moral rightness of *apartheid*.

17 Eg the case of Sandra Laing (1967) Times 2 October, where a child was classified as 'white' when born, then re-classified as 'coloured' and re-classified again as 'white'. When, according to a government directive, she was due to be admitted to a white school, most of the parents of the other children threatened to withdraw their children. Again, the very policy of *apartheid* suffered a blow when white miners refused to train Africans for skilled jobs in the mines within designated African homelands.

18 *Olivecrona* (1939) See also 'The Imperative Element in Law' (1964) 18 Rutgers LR at 806.

> The relevant point is that the provisions of the draft are made psychologically effective. And this result is attained through the use of a certain form, which has a grip over the mind of the people"[19].

The reason why pressure is associated with agencies and procedures is partly because it is a tradition, and partly because the organised force of the community can be brought to bear in connection with them. Olivecrona illustrates the point with the example of a successful revolution. The explanation of how the new order wins obedience is not just force, but that the revolutionaries control the machinery capable of exerting the necessary psychological pressure. When the revolution is peaceful, they take over the existing machinery and the psychological forces associated with it, and their only problem is to accustom people to the use of this machinery by themselves. This is what happened in the 'Bloodless Revolution' of 1688–1689, and in the Rhodesian Revolution, where after UDI the Rhodesians found no difficulty in continuing to accept the use by the rebels of the existing, local law-making apparatus and its psychological associations, to which they were accustomed, rather than the unfamiliar machinery of Westminster, which the British Government sought to substitute in its place. When the revolution is violent, the revolutionaries may create new machinery and a new psychological association, eg the Russian Revolution. In either case, force and propaganda have to be maintained until the new order becomes established. Propaganda especially is important in creating the new psychological association.

The question remains: why was a particular criterion of validity accepted in the first place? The circumstances in which statute, judicial precedent and immemorial customs came to be accepted reveal underlying historical, social, political and moral factors.

Acts of Parliament, or more fully Acts of the Crown in Parliament, are constituted by the assent of the Crown, the Lords and the Commons. The Crown in Parliament as the supreme law-making institution was accepted in 1689 after a revolutionary break with the past. There was no legal justification for the change; it became 'legal' because the judges internalised it. Previously the position was that, although Parliament did have legislative and judicial functions[20], it was only convened in an advisory capacity. The King used to legislate with the advice of Parliament in important matters and through prerogative legislation in other matters. By Stuart times the national mood had changed. Not only was the Puritan country opposed to the later Catholic Stuarts, but the Kings had been forced into unpopular exercises of prerogative power to raise money. When their legality came to be tested in the courts, notwithstanding the King's alienation of judicial sympathy[1], the judges had to uphold the historic validity of prerogative legislation[2]. The conflict between the King and Parliament erupted into civil war in the seventeenth century ending in a victory for Parliament in 1688–1689 and the acceptance by the judiciary of the Crown in Parliament henceforth as the supreme legislative authority in place of the prerogative. The

19 *Olivecrona* (1939) pp 54, 60; (1971) pp 93 et seq.

20 Fleta II, 2.1.

1 By setting up the prerogative courts of which the common law courts were intensely jealous, and by interfering with judges by way of arbitrary dismissals, eg of Coke CJ. The judges did seek to impose limits on the prerogative in the *Case of Proclamations* (1611) 12 Co Rep 74.

2 *Case of Impositions* (*Bate's Case*) (1610) 2 State Tr 371; *R v Hampden* (*Case of Ship Money*) (1637) 3 State Tr 826.

judges acted as they did for a variety of reasons. One explanation may lie in the fact that men like Scroggs and Jeffreys had brought the judiciary into such disrepute by the close of the Restoration that the judges dared not risk giving further cause for offence. Another may be weariness after nearly a century of turmoil, which led to the feeling that it was best to let things be rather than provoke needless trouble. A third was the awareness of political realities by the judges themselves. For, if they had refused to recognise the change, an entirely new conflict would have been precipitated between them and the legislature. It was avoided because the judges accepted the change. The fact that the triumph of the doctrine of the supremacy of the Crown in Parliament depended on its acceptance by the judges does not imply that Parliament would not have succeeded had the judges resisted. The battle would in that event have assumed a new dimension and would have resulted in the subordination of the judiciary as well. The point is that Parliament triumphed in the way it did because of the support of the judges.

This leads to a consideration of effectiveness as a reason for accepting a legislative authority. As to this, it should be emphasised that effectiveness is not a condition of its own law-quality or even of its enactments, but only a factor which in time induces courts to accept and continue to accept it[3]. A situation may be supposed in the midst of a revolution where the old order has gone and no new order has effectively replaced it. In such a lacuna the courts can continue to apply as 'laws' the enactments of the old order even though it is no longer effective. The label 'laws' attaches to whatever the courts are prepared to accept as such; their acceptance of the law-creating source is a separate matter. Even if the old order is ineffective and there is a new, effective order, the courts may still treat the old order as 'legal' and the new as 'illegal', or simply '*de facto*'. The Rhodesian revolution provided an example. On 11 November 1965, the Rhodesian government unilaterally declared its independence of Britain, repudiated the Constitution of 1961 and promulgated a new one in its place[4]. The revolutionary régime was undoubtedly effective and remained so despite efforts by Britain to bring it down through the imposition of sanctions. In the test case of *Madzimbamuto v Lardner-Burke*[5] the court of first intance decided in the following September that the régime was illegal, but accepted the decree on which the Minister based the order in question as 'law' on grounds of necessity. The Appellate Division by a majority held in January 1968 that the régime still had not acquired *de jure* validity, although it was effective *de facto*. It also reversed the court of first instance by holding the Minister's order invalid on a technical ground. Later that same year the Judicial Committee of the Privy Council also declared the régime to be illegal.

Not only is the legality of a revolutionary régime independent of effectiveness, but it also has jurisdictional (spatial) and temporal dimensions. Thus, although the Rhodesian régime was eventually accepted as legal by the Rhodesian courts[6], British courts never did so. In *Adams v Adams* (*A-G*

3 *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 159, 232-233, 242.

4 The 1965 Constitution and its successor have since been superseded.

5 Court of first intance: Judgment No GD/CIV/23/66 of 9 September 1966 (published as a Government Blue Book); Appellate Division: 1968 (2) SA 284 of 29 January 1968; Privy Council: [1969] 1 AC 645, [1968] 3 All ER 561. For discussion of some of the points dealt with here, see Dias 'Legal Politics: Norms behind the *Grundnorm*' [1968] CLJ 233.

6 On 13 September 1968 in *R v Ndhlovu* 1968 (4) SA 515, the Appellate Division refused to obey the Privy Council's ruling in *Madzimbamuto*.

intervening a British court refused to recognise a divorce decree pronounced by a Rhodesian judge, who had not taken the oath under the 1961 Constitution. This shows that legality depends on the jurisdiction in which the matter is considered, quite apart from effectiveness[8]. The temporal dimension is brought out by a decision of the Pakistan Supreme Court, *Jilani v Government of Punjab*[9], which rejected effectivness altogether as the criterion of legality. In an earlier case, *The State v Dosso*[10], the Supreme Court had held that a revolutionary régime, which was effectively in power, was legal and had thereby destroyed the previous Constitution no matter how or by whom that change had been brought about. In *Jilani* the Supreme Court rejected this as a wholly unsustainable proposition and overruled *Dosso*. The point, however, is that this decision was given *after* that revolutionary régime had itself been overthrown so that the declaration that it was illegal *ab initio* was retrospective[11].

Madzimbamuto's Case illustrates the further point that the validity of 'laws' and of the law-constitutive medium are separate questions. Effectiveness relates to the acceptance of the latter. Both the Rhodesian courts and one judge on the Judicial Committee held that, although the régime was not lawful, at least some of its enactments could be accepted as 'laws' provided that they conformed to the old 1961 Constitution, the implication of which is that an illegal authority can enact valid 'laws', while the previous and now ineffective authority continues to possess some legal force[12].

In the result it would seem that the effectiveness of the legislative authority is not a condition of the validity either of 'laws' or even of itself. It is a factor which *in time* induces the courts to accept such authority. Nor is it the only such factor. Others are force, propaganda and packing the Bench with judges who will comply, all of which only reinforces the contention that the legality of the law-constitutive medium only comes about when the courts accept, or are made to accept it[13].

There was also a moral factor behind the acceptance of the Crown in Parliament. The sovereignty of the prerogative was rejected because it had been used immorally by the King, and the Crown in Parliament was adopted

7 [1971] P 188, [1970] 3 All ER 572, rejecting *Ndhlovu*. Cf *Bilang v Rigg* [1972] NZLR 954: and see Southern Rhodesia (Matrimonial Jurisdiction) Order 1970, SI 1970/1540. In *Re James (an Insolvent) (A-G Intervening)* [1977] Ch 41, [1977] 1 All ER 364, the majority of the Court of Appeal held that the 'High Court of Rhodesia', sitting under the revolutionary Constitution, was not a 'British Court'.

8 The jurisdictional distinction was acknowledged by MacDonald JA in *Madzimbamuto's Case (No. 2)* 1968 (2) SA 457 at 463.

9 Pak LD (1972) SC 139.

10 (1958) SC Pak 533. See also *Uganda v Commissioner of Prisons, ex p Matovu* [1966] EALR 514.

11 In view of the heavy reliance on *Dosso* by the Appellate Division in *Madzimbamuto's Case*, it is interesting to speculate what effect, if any, its overruling might have had on the reasoning in *Madzimbamuto*. In post-war West Germany the courts might have declared the formally enacted legislation of the Nazi era to be void retrospectively, but they refrained from actually doing so: see Pappé 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 MLR 260.

12 In *Bilang v Rigg* [1972] NZLR 954, a New Zealand court recognised the validity of the appointment of a court officer after UDI on the ground that he had been appointed under a valid statute, that he had acted according to lawful intructions of the Governor and that his action did not contravene UK legislation.

13 Cf. the unanimous opinions in *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 159, 162, 229, 230, 261, 267. In both *Madzimbamuto's Case* and *Dosso's Case* the theory of Hans Kelsen, which is based on effectiveness, was invoked in support; *Jilani* repudiated it *in toto*.

in its place in 1689 in order to guard against such abuse. Similar reasons also underlay the revolt of the American colonies against the abuse of power by the Crown in Parliament and the adoption there of a new institution. In South Africa the form in which the law-making institution came to be accepted stemmed from political compromise. The 'entrenched clauses' of the South Africa Act 1909 sought to safeguard certain minority rights by providing that a statute affecting these had to be passed by at least a two-thirds majority of both Houses of Parliament sitting together. This arrangement was part of the political compact between the four provinces as a condition of their union.

There is thus an arguable case for contending that courts should take account of the moral basis on which a criterion of validity was initially accepted when pronouncing on the validity of subsequent enactments, and this will be considered more fully later[14].

Turning next to the acceptance of judicial precedent as a criterion of validity, a distinction has to be drawn between the doctrine of precedent, which is that like cases should be decided alike and is in no way peculiar to common law systems, and the special doctrine of precedent in the common law, which is that decided cases in certain circumstances possess *law-quality* in themselves and are also *binding* in that they have to be followed or distinguished. A convenient nomenclature for the common law doctrine is *stare decisis*, derived from *stare decisis et quieta non movere*, so as to distinguish it from the broad doctrine of precedent shared by all developed systems.

No system of law can be a 'system' without regularity in the way in which disputes are decided. Therefore, a fundamental reason for the acceptance of a doctrine of precedent is the moral dictate of justice that like cases should be decided alike. If people are required to settle disputes by peaceful process rather than by resorting to self-help, which is a prime consideration in the dawn of society, such process should dispense what they feel is justice in the situation complained of as being unjust. In order to do this, it is essential to foster confidence in the peaceful settlement of disputes. Judgments are pronounced on the facts of individual cases and the chance that the facts of even two cases will be identical in every particular is so remote that, as a practical matter, similarities and dissimilarities can only be viewed on the basis of generalisations and classification of facts into types. So the requirement that like cases should be treated alike reduces itself to minimising arbitrariness and caprice in the perception of similarities and dissimilarities. This is achieved up to a point by using previous cases as paradigms furnishing broad type-situations.

The doctrine of precedent in English law is of considerable antiquity, while that of *stare decisis* is relatively modern. Judges in the twelfth century did listen to citations of earlier cases and were no doubt influenced by them in reaching their decisions. Thus, Richard Fitz-Nigel, writing around 1177 and 1179, said 'There are cases where the courses of events, and the reasons for decisions are obscure; and in these it is enough to cite precedents'[15]. There was not at this time any suggestion that judges were bound by them, nor do the early writers give any such indication. In other words, the mere fact of being forming the basis of a decision did not of itself invest a proposition with the quality of being 'English law'.

14 See pp 91–93 post.

15 Fitz-Nigel *Dialogues de Scaccario* 17.

If one were to inquire why it is that in Britain today precedents have law-quality, it would be difficult to offer a reason. The only reply is that this has come to be one of the accepted bases upon which the system now rests. The genesis of it lies in factors peculiar to this country, principally the absence of a code. The Normans forbore to impose an alien code on a half-conquered realm, but sought instead to win as much widespread confidence as possible in their administration of law. This was achieved through the institution of itinerant justices touring different circuits[16]. There being no central code, these justices had no guidance other than local customs, and their implementation of these gradually won local support for the new system in that it was seen, in the main, to fulfil people's expectations. In the longer term the practice of following like cases was extended over all parts of the realm. In this way lines of similar decisions evolved in time, like cases following upon each other, and eventually it became possible to look back along those lines and to distil general propositions from them, which came to be known as the common custom of the realm or the common law[17]. 'Nor, speaking more generally', said Lord Asquith, 'does English jurisprudence start from a broad principle and decide cases in accordance with its logical implications. It starts with a clean slate, scored over, in course of time, with *ad hoc* decisions. General rules are arrived at inductively, from the collation and comparison of these decisions'[18]. So, too, Lord Denning: 'We do not seek, as Continental jurists do, to lay down principles first by abstract reasoning and then apply them to concrete cases. We decide cases according to their merits and then see what principle emerges from them'[19]. Not only the common law, but equity too developed in this way. So it came about that the principle of justice gave rise to a system of precedent in the broad sense in this country as elsewhere.

The law-quality of precedents is attributable, as already stated, to the absence of a code. Decisions were not illustrations of law to be found elsewhere, but were the only statement that there was of the law. Also, in the early days decisions were believed to be expressions of natural law, and the earlier the decision the more truly was it supposed to reflect ideal law. As the gulf of time widened, judges became increasingly reluctant to challenge old decisions. Bracton and Coke, for example, preferred older authorities. The former, as Plucknett pointed out, attempted in his treatise to persuade his contemporaries that the laws of the day had become distorted and had departed from the earlier 'true' principles. Once this attitude of mind became ingrained in the outlook of lawyers with regard to ancient decisions, its application to all decisions, both old and new, is not hard to appreciate. In the dawn of the nineteenth century the critical spirit of positivism dispelled belief in natural law, and it needed but this to invest decisions themselves with ultimate authority. Even before this, the common law had become the people's champion against governmental oppression, so no one dared to suggest that it should be replaced with a code.

16 The assize system was abolished in 1971 by the Courts Act 1971 and replaced by Crown Courts.
17 Cf Gluckman *Judicial Process Among the Barotse*, pp 253-258; Stein *Regulae Juris*, ch II.
18 *Chapman v Chapman* [1954] AC 429 at 470, [1954] 1 All ER 798 at 819.
19 Denning *The Changing Law* p 50; and also *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 at 313, [1968] 1 All ER 229 at 236. See also Cardozo *The Nature of the Judicial Process* p 23.

A different factor, which paved the way for *stare decisis*, is the prestige of the judges, who have always been chosen from among the leaders of the Bar and represented the apex of the profession[20]. A historical factor which enhanced that prestige was their successful resistance to the Royal endeavour to override individual rights by virtue of the prerogative.

It may be asked whether the doctrine of *stare decisis* is itself a rule of law. If it were treated as such, it could not be reconciled with the doctrine that the common law has existed from time immemorial; but this, as will presently appear, is a pious fiction. A better way of looking at the matter would be to say that the application of the label 'law' cannot rest on 'legal' considerations. The acceptance of the term 'law' to principles enunciated in precedents evolved historically, but none of them can justify the usage by virtue of which they themselves acquired law-quality. *Stare decisis* is one of the foundations upon which English law rests. The practical question is not what it should be called, but whether it is satisfactory.

The acceptance of immemorial customs as 'law' is bound up with the larger question as to how practices generate the belief that they ought to be followed. It is a philosophical axiom that a normative 'ought' cannot be derived from an 'is', which in the present context means that the fact of a practice does not of itself explain why it ought to be followed[1]. The 'ought' stems from a value-judgment, which is sometimes concealed. Thus, in the statement, 'X is your father; therefore you ought to help him', the 'ought' derives, not from the fact that he is the father, but from the unstated moral attitude attaching to the parent-child relationship[2]. Again, in the statement, 'X is smaller than you; therefore you ought not to hit him', the 'ought' derives from the disapproval of hitting persons smaller than oneself. In the case of the practices of people at large the position becomes more complex, and it is at this point that the pressure exerted by interlocking practices, previously mentioned, comes into play. The greater the number of people involved, the more numerous are the interlocking practices that invariably develop among them, the result of which could make it highly unsettling if individuals refuse to conform. The aversion that is then generally felt towards disruption and inconvenience accounts in good measure for the sense of obligation towards conformity in such cases. For people make plans on the basis of expectations that a practice will be observed, and the more widespread this is, the greater the pressure against frustrating such hopes. Language, too, is an important factor in creating emotional responses towards conduct. Non-conformity, which unsettles the interlocked behaviour-patterns and expectations, is disapproved and comes to be associated with such words as 'wrong', 'irresponsible', 'bad', 'immoral'; while conformity tends to be associated with such words as 'right', 'responsible', 'good', 'moral'. In this way the inherited traditions of words contribute materially to generating feelings of 'ought' and hence of 'duty'. It will be seen, therefore, that it is not

20 *Salmond on Jurisprudence* (12th edn) pp 141–12. Cf Goodhart 'Precedent in English and Continental Law' (1934) 50 LQR 60.

1 This thesis is ascribed to Hume *A Treatise on Human Nature* III, 1.1. For discussions, see *The Is/Ought Question* (ed Hudson); Kolakowski *Positivist Philosophy* pp 42 et seq; Samek *The Legal Point of View* pp 181–185; Toulmin *An Examination of the Place of Reason in Ethics* ch 2; Warnock *Contemporary Moral Philosophy*. There is a different sense in which an 'ought' is derived from an 'is' which has been considered earlier. See p 21 ante.

2 See on this Emmet *Rules, Roles and Relations* pp 42 et seq.

the development of a practice as such, but the growth of the conviction that it ought to be followed that constitutes its acceptance as a *rule* of behaviour.

It has already been pointed out that general customs of the realm are the common law. Immemorial customs now under discussion are local variations of the common law. Judges accepted them in the early days because not to have done so would have unsettled local expectations. Besides, respecting them helped to foster confidence in the royal administration of justice, while the judges, for their part, welcomed any guidance they could find in the nascent state of the law.

The foregoing discussions show how far the original inquiry into the internalisation of standards of behaviour can and does reach into realms remote from its prosaic beginnings. Yet, the steps in that progression follow one by one. The factors behind internalisation are imprecise and unpredictable, which may be why they are excluded from formal analyses; but they remain necessary to a full understanding of 'rule'. It shows again that this legal phenomenon cannot be isolated from the moral, social, historical and political context of society except by drawing an arbitrary cut-off point.

LAWS

As with 'rule', the raw material of the law as set out in the previous chapter did not include 'a law'. This is because 'a law' is only a particular way of organising the material and also because its formulation presupposes to some extent a concept of 'legal system'.

The identification, or as Jeremy Bentham put it, 'individuation', of 'a law' is a matter of definition and reflects the definer's way of organising legal material. This can be shown by contrasting Bentham's, John Austin's and Hans Kelsen's ways of 'individuating' a law. Bentham believed that a 'legal system' is only the sum-total of laws and that one only needs to identify 'a law'[3]. This he did in substance by positing an act-situation at the core of each law. Thus, 'You ought not to do X', and 'If you do X, you ought to be punished', are two separate laws dealing respectively with different act-situations. In fastening on acts as the substrate of laws it would appear that he subscribed to the belief that the expression 'a law' had to have a factual counterpart. This is not above criticism, but it is not necessary to enter into the objections here[4]. Kelsen, on the other hand, rolled into one what for Bentham are two separate laws. According to him, a law is in the form: 'If X, then sanction Y ought to follow'[5]. The doing of X is a condition precedent to the ordering of the sanction. Bentham's disciple, Austin, shared his mentor's belief that a 'legal system' is the sum-total of laws, but unlike him went on to define 'a law' as the command of a sovereign backed by a sanction; which is different again[6]. All these ways of 'individuating' a law will be considered later, but the point to be made here is that they all represent different ways of isolating 'a law' out of the same material.

The concept of 'a law' also presupposes 'legal system'. For instance, it would popularly be thought that the statutory prescription of a fine for

3 Bentham *Of Laws in General* (ed Hart), and more generally pp 336, 341 et seq. post.
4 See p 337 post.
5 Kelsen *General Theory of Law and State*; pp 359 et seq. post.
6 Austin *Lectures on Jurisprudence*; p 345 post.

unauthorised parking is 'a law'. Bentham pointed out that such a precept is made up of strands of various other parts of the law just as, to use his own 'coarse allusion', a slice of meat cut by a butcher is a conglomerate cross-section of muscle, bone, tendons, nerves etc. An anatomist's dissection would seek to reveal the whole muscle, tendon etc[7], and, similarly, a jurisprudential analysis of a precept such as the imposition of a fine for unauthorised parking would follow out its various strands, such as the system of courts for trying offenders, the authorisation of parking-meters, appointment of traffic wardens, procedures, ways of obtaining evidence, scales of punishments, and so on. Any particular precept presupposes the whole background and its analysis will unfold the whole system of which it is a part.

Another way of making the same point is by harking back to the concept of liberty, which was discussed earlier[8]. The question was then raised as to whether liberties are part of law. Pound and Kelsen, it will be remembered, denied that they were. This looks plausible in cases where the liberty lies in the area as yet untouched by encroaching duties, but it is less plausible, if not unacceptable, in cases where the liberty is created by the abolition of a duty, eg by statute. The point is that whether liberty is treated as being within or outside law reflects one or other of two ways of regarding 'legal system': as 'open' or 'closed'. An 'open' concept confines 'law' to areas of specific regulation by authority. Areas not yet regulated are then outside 'law', which means that the concept of law remains open in these areas to future regulation. A 'closed' concept treats all areas as falling within 'law', whether regulated positively or negatively in the sense that it is still the law that allows or creates liberty.

Yet another pointer in the same direction is the thesis propounded by Professor Honoré that to understand 'a law' one should begin by understanding 'a group'[9]. Every law is a law of some group, and 'law' in its broad sense is a group structure designed to secure obedience to group prescriptions. For present purposes it is sufficient only to draw attention to Professor Honoré's contention, which will be explained later[10].

The upshot of all this is that neither 'rule' nor 'a law' is part of the basic material. An examination of them is helpful in clarifying the ground. Since in one way and another they reflect 'legal system', it is this that has to be considered.

LEGAL SYSTEM

As stated above, Bentham and Austin believed that 'law' in the sense of 'legal system' is only the sum-total of laws and that elucidation of 'a law' is all that is necessary. This, as will have become evident from the foregoing analysis, was mistaken. In addition there is the further objection that a legal system is more than the sum-total of laws or legal material; it represents the pattern of interrelation of this material and differs from them also in its overall purposes and functioning.

7 Bentham *Of Laws in General* p 12.

8 See p 31 ante.

9 Honoré 'Groups, Laws and Obedience' in *Oxford Essays in Jurisprudence* (Second Series) (ed Simpson) ch 1.

10 See pp 443-444 post.

Pattern of interrelation

A railway system, for example, is not just the sum-total of tracks and rolling stock stacked together; the system is the pattern of their linkage and distribution. In areas rich in coal and iron, for instance, and around major ports, the network of railways will tend to be thick and complex, but less so in areas of desert; and the lay-out will vary again in mountainous districts and over plains. With regard to a legal system, as a generalisation it may be stated that the pattern of linkage imparts unity to all its components, which can be discerned through the concept of validity and through the institutional structure.

Validity refers to the law-quality of a proposition: if it has law-quality, it is a valid proposition of law, if not, it is invalid. Validity, therefore, unifies legal material at its foundation; it is what makes it all 'legal' and isolates it from non-legal material. It has been explained that legality depends on the acceptance by courts of some criterion, or criteria, as capable of imparting law-quality to propositions filtering through them. In this country they are Acts of Parliament, judicial precedents, immemorial customs and, by virtue of statute, Regulations and Decisions of the European Economic Community. Because of judicial acceptance of principles, doctrines and standards as 'legal', these, too, come under the umbrella of validity[11].

The institutional structure of a legal system pulls it together in a different way[12]. There are only a certain number of law-making institutions, which between them cover the entire system. The Crown in Parliament stands at the top; bodies with subordinate legislative power are strictly defined and derive their power from Parliament. The courts, which apply the law and also have power to make law through precedents, are strictly defined and limited in number. Immemorial customs occupy an odd position. Theoretically their law-making power is unspecified and amorphous, which reflects the historical past. Since early times, however, the legal system has filled out and become increasingly unified through the expanding activity of statute and precedent with the result that the law-making potentiality of customs has dwindled into virtual nothingness. The point will be dealt with further under custom.

Next, there are law-applying and law-enforcement institutions. Courts come into this category and in addition to those that can make law, there are a number of subordinate courts and tribunals, all of which are defined; and the range of orders and punishments courts can decree is likewise defined. Enforcement through the use of organised force is institutionalised through bodies such as the armed forces, the police and other bodies of officials. As before, the number of such institutions is limited and their powers are defined.

Finally, there are conceptual institutions within the law itself. Its *corpus* is pulled together by institutions which unify fact-situations and legal consequences. Instead of each situation being governed separately by its own

11 Theories of validity have variously been based on the will of God (Aquinas); will of the sovereign (Bentham, Austin), the *Grundnorm* (Kelsen); a rule of recognition (Hart). See later in connection with each of these authors.

12 Raz 'The Institutional Nature of Law' (1975) 38 MLR 489; on which see Reid and Schiff (1976) 39 MLR 118.

regulation, there is a single regulation applicable to a class of facts. This is accomplished through unifying concepts, such as possession, ownership etc[13].

Purposes and functioning

The very word 'system' implies that a legal system consists of co-ordinated activities; there cannot be a system without co-ordination and regularity. Co-ordination in turn implies that the activities are not haphazard but purposive in the sense that they are directed towards achieving different objectives. The way in which these tasks are put into effect and the extent of their success or failure involves an inquiry into their actual functioning. The activity of any phenomenon must take time over its functioning and, therefore, the phenomenon must continue in existence over that period.

To list the many tasks which a legal system sets out to achieve would be tedious. Speaking broadly, it can be said that one task is to provide a framework within which people conduct their affairs. Thus, the legal framework shapes many daily activities, eg buying and selling, giving credit etc, are shaped by the way in which promises are enforced. Another more difficult task, previously alluded to, is the educative function of shaping people's ideas. One of the most important, indeed, the overall task is to achieve justice in society[14]. As one of the main purposes of any legal system it is difficult to see how this could be doubted, whatever the problems and difficulties that beset the meaning of 'justice' and the practicalities of its achievement. Justice is integral to the concept of a legal system; the etymology of the word 'law' itself derives from what is fitting and right[15]. Even where injustices are practised, and no one doubts that these do occur, the authorities contrive to hide them behind a veil of justice, however thin, and it is when such practices become intolerable to the masses and the veil becomes threadbare and transparent that revolution tears the system apart in the hope of establishing a new and more just system in its place. The achievement of a minimum of justice is a condition *sine qua non* of the continuity of a legal system, and some of the many aspects of justice will be the concern of the next Part of this book.

13 MacCormick, 'Law as Institutional Fact' (1974) 90 LQR 102.

14 See eg Del Vecchio 'On the Function and Aims of the State' in *Essays in Jurisprudence in Honor of Roscoe Pound* at p 150.

15 Clark *Practical Jurisprudence* p 90 and passim.

READING LIST

J Bentham *Of Laws in General* (ed HLA Hart).

HLA Hart *The Concept of Law*.

A M Honoré 'Groups, Laws and Obedience' in *Oxford Essays in Jurisprudence* (Second Series) (ed A W B Simpson) ch 1.

D N MacCormick 'Law as Institutional Fact' (1974) 90 Law Quarterly Review 102.

K Olivecrona *Law as Fact* (1939 and 1971).

J Raz 'The Institutional Nature of Law' (1975) 38 Modern Law Review 489.

P G Stein *Regulae Juris*.

W L Twining and D Meirs *How to Do Things with Rules*.

PART II

Aspects of justice

SUMMARY

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CHAPTER 4

Distributive justice

The quest for justice has been as challenging as the quest for the Holy Grail, and as elusive. To some this is because justice is a will-o'-the-wisp, to others because it is too vast to be encompassed by one mind. The master mind of Aristotle (384–322 BC) was superior to most people's and his pioneer analysis still serves as a crucible into which even modern craftsmen continue to pour problems of the 20th century in the hope that an acceptable brew will emerge. At least his discussion provides a starting point. In dealing with 'particular justice', as distinct from 'universal justice', he distinguished between 'distributive' and 'corrective' justice[1]. Distributive justice is based on the principle that there has to be equal distribution among equals[2]. Corrective justice seeks to restore equality when this has been disturbed, eg by wrongdoing, which assumes that the situation that has been upset was distributively just.

The Aristotelian principle suffers from certain weaknesses. The first is: distribution of what? Aristotle spoke of the distribution of 'honours or money or the other things that fall to be divided among those who have a share in the constitution'[3]. Such a formula is imprecise and will be considered presently. More important is the criterion of 'equal' and who decides equality. Equal distribution among equals means that according to a given criterion of discrimination, unequal cases are to be treated differently, which still leaves open the question whether it is just to select that particular criterion[4]. Also, amongst those classed as equals one person may complain of injustice if he is treated worse than the others. What if he is treated better? For instance, if black people are treated as less privileged than white people, but one black man is given the same privileges as whites, this would be unjust as far as other black people are concerned. Would it be just or unjust as far as he himself is concerned; or white people? This harks back to the justice of the criterion for discriminating between the two groups in the first place.

Another difficulty is that equal treatment in law of things unequal in fact, such as power, talents etc, may widen or create inequalities. Thus, for the law to insist on sanctity of contract on the ground that contracting parties stand on an equal footing when in fact there is inequality in their respective bargaining positions, has led to various forms of injustice, eg between employer and employee, or public authorities and individuals. To take account of inequalities in fact there has to be unequal treatment in law, which means that the question when the law should depart from equality has to be determined on some principle other than equality. Lastly, the distinction between

1 *Nicomachean Ethics* V (trans Rackham).
2 *Nicomachean Ethics* V, 3.
3 *Nicomachean Ethics* V, 2.
4 Honoré 'Social Justice' in *Essays in Legal Philosophy* (ed Summers) 61 at 68–69.

distributive and corrective equality is by no means clear. The unsatisfactory cases of *DeFunis v Odegaard*[5] and *Regents of the University of California v Bakke*[6] show the difficulty. In both a white student sued a university on the ground of unjust discrimination because the university admitted black and Indian students with lower qualifications than were required of white students. In *De Funis*, since the white student was admitted before the conclusion of the appeal, the American Supreme Court by a bare majority held that there was no issue[7]. In *Bakke* the Supreme Court did decide, again by a bare majority, that the university was in the wrong, but extracting a coherent principle from the judgments defies ingenuity. Both cases, however, raise the question whether this kind of reverse discrimination was designed to create distributive justice by providing equality of educational opportunity, or was a form of corrective justice to redress an inequality through past discrimination.

It should be evident from all this that justice is not synonymous with equality; equality is one aspect of it, no more. Justice is not some 'thing', which can be captured in a formula once and for all[8]; it is a process, a complex and shifting balance between many factors, including equality. As Friedrich observed 'Justice is never given, it is always a task to be achieved'[9]. The tasks of justice submitted in this book are the just allocation of advantages and disadvantages, preventing the abuse of power, preventing the abuse of liberty, the just decision of disputes and adapting to change. Aristotle's distributive justice would be associated mainly with the first three and his corrective justice mainly with the fourth. The five tasks have been listed in this way for the purpose of exposition. They are not disjunctive for, as will appear, the need to curb the abuse of power and liberty underlie the others.

Some modern writers approach justice differently from Aristotle. Professor Honoré suggests that it would at least be 'refreshing to look at justice, not so much from the Aristotelian point of view of the just man, but from that of the citizen to whom just treatment is due'[10]. From a somewhat similar point of view Cahn speaks of the 'sense of injustice'[11]. It is true that persons with grievances are those who raise the question of justice. There is, therefore, much to be said for this angle of approach, but the problem goes deeper. It is not enough to work out a just scheme of distribution, from whatever point of view, but there is the further problem of getting it accepted and keeping it acceptable; which requires constant re-distribution according to changing circumstances. Both initial acceptance and continued acceptance depend on people feeling that the scheme is at least not unjust.

Just allocation of advantages and disadvantages

This is the first of the tasks listed above. The difficulty of securing acceptance of a scheme of allocation and, even more so, of keeping it acceptable arises from the fact that the sense of injustice is a capricious sentiment, which is likely to be influenced, even changed, by the distribution that presently

5 40 L Ed (2d) 164 (1974).
6 438 US 265 (1978).
7 Douglas J alone discussed the merits: see 40 L Ed (2d) 164 (1974) at 171 et seq. See on this case Paulsen '*De Funis*: the Road not Taken' (1974) 60 Virginia LR 917.
8 See eg the theories of Aristotle, Kant, Stammler, Marx and Rawls.
9 Friedrich 'Justice: the Just Political Act' 6 *Nomos, Justice*, at 34.
10 *Honoré* p 62.
11 Cahn *The Sense of Injustice* (1949).

exists. For instance, the welfare state attempts to satisfy 'basic needs'. The word 'basic' implies that over and above certain minima, it is open to some people to enjoy additional amenities, so that there will continue to be 'haves' and 'have-nots'. The tendency sooner or later will be for the latter to start insisting that some of the things which they would like, but do not have, are 'basic' and hence 'needs' and due 'as of right'. As Professor Honoré has observed 'What is at one time a luxury becomes at another time a necessity and need'[12]. Also, no one likes to feel indebted and grateful. Rather than have to feel grateful for benefits received, a not uncommon psychological reaction is to convince oneself that these are due 'as of right' for which there is no call for gratitude, and to start furbishing new demands. All schemes of a just distribution will be brought to nought if the more that is given, the more is demanded 'as of right'[13]. This does not necessarily follow, but, human nature being what it is, the danger does appear to be real[14]. The safeguard lies in a sense of obligation as opposed to a sense only of 'rights'. An unfortunate by-product of the welfare state has been the encouragement of a sense of 'rights' to the virtual exclusion of a sense of obligation. Any scheme of justice is likely to turn sour if nurtured on ideas of 'rights' alone. To adopt the point of view of 'the citizen to whom just treatment is due' should not commit one to consider only his 'rights'; what is due *from him* is just as relevant. To promote and maintain a successful scheme of justice requires the promotion of a sense of obligation, requiring among other things, a curb on the appetite for 'rights', especially when this leads to abuse of liberties.

Another difficulty in the way of winning and preserving acceptance of a scheme of distribution is the need to have confidence in those who decide what are basic needs, how advantages and disadvantages are to be distributed and when they are deemed to be satisfied. The persons who decide these matters have to be invested with powers, and the problem then is one of curbing the abuse of power.

Turning now to the 'things' that fall to be distributed, it is not enough to refer to them simply as 'advantages' and 'disadvantages', or as 'honours or money or the other things that fall to be divided among those who have a share in the constitution'. All such terms need to be categorised more precisely. Different considerations apply to distribution between individuals and over the community, and a sense of injustice works differently with different kinds of advantages and disadvantages. It is here that the Hohfeldian distinctions, considered earlier, prove helpful. Hohfeld was concerned solely with analytical subtleties, not with a theory of justice, although he did remark at the end of his paper that his distinctions make it possible 'to discern common principles of justice and policy underlying the various jural problems involved'[15]. This was not a considered statement, and he has been

12 *Honoré* p 78.

13 One recalls Goldsmith's lines:

> 'Ill fares the land, to hastening ills a prey,
> Where wealth accumulates and men decay': (*The Deserted Village*).

14 One example is the abusive demands made on the 'free' health service which has forced retrenchments in various ways. Arguably, welfare benefits enjoyed by families of strikers helps, at least to some extent, to carry out strikes damaging to the very institution that provides the benefits. See on this, 'Financial Strikes', Conservative Political Centre (1974). Cf Lasko, 'The Payment of Supplementary Benefit for Strikers' Dependants—Misconception and Misrepresentation' (1975) 38 MLR 31.

15 Slohfeld *Fundamental Legal Conceptions* (ed Cook) p 64.

criticised for it[16]. However, the application of his distinctions to the problem of distributive justice might posthumously tinge his allusion to justice with some relevance.

Starting with disadvantages, the most abundant of these are duties and liabilities. The imposition of duties is always dictated by policy. Doing justice here involves balancing various considerations, for which no rules can be laid down. With regard to the imposition of liabilities, equality should be a very rough guide so that special variations in their incidence require justification. Thus, various criteria are used to justify the unequal imposition of taxation[17], or liability to expropriation or destruction of property in emergencies, or equal liability to rationing in times of shortage. With regard to disabilities, when these affect large numbers of people the question of justice concerns their removal so as to produce equality of advantage rather than their imposition, eg those attaching to women, Jews, Catholics, agnostics and even today to members of certain races in countries where a racial policy obtains. It is the imposition of disabilities that calls for justification. When they attach to individuals, the reasons why they are imposed cannot stem from equality; the justice behind them derives from other considerations. For instance, a man has a disability to insure against his own intentional wrongdoing. This is based on a moral consideration, not equality[18]. On the other hand, he is allowed to insure against negligence, but here the moral consideration is outweighed by the need to compensate the victim[19]. To talk of a distribution of no-claims has a ring of unreality, which disappears when it is realised that the no-claim of one person corresponds with the liberty of another to perform some action (usually to exercise a power, eg reduce a fee normally payable). The question of injustice here concerns the manner in which the liberty and power are exercised.

Advantages may be divided into claims, liberties, powers and immunities. With regard to claims, Professor Honoré invites his readers to consider 'not primarily the duty to act justly, but the demand for just treatment'; and he continues: 'Following Hohfeld's usage it seems appropriate to use the word "claim" in this context to mark the point that we are here concerned not, as we are in the analysis of liberty, with the question "What are men permitted to do?" but with the question "What are men entitled to demand?"'[20]. For this purpose claims can be divided into those correlative to negative and positive duties. With regard to negative duties, eg the duty not to injure others, no one should be accorded less protection by way of correlative claims than his neighbour unless he forfeits it by choice or his own conduct, eg by consent or aggression. With regard to claims correlative to positive duties, these can be divided into claims against individuals and against the state. The allocation of the former presents no difficulty since they and the fulfilment of the duties rest largely on choice, eg contractual claims and duties. The allocation of the latter type of claim depends on state policy, eg that the

16 J Stone *Legal System and Lawyers' Reasonings* p 161; and see Ch 2 ante.

17 In *Roberts v Hopwood* [1925] AC 578, the House of Lords invalidated a scheme drawn up by a local council on the ground that it distributed the liability to tax unequally among ratepayers. See also *Prescott v Birmingham Corpn* [1955] Ch 210, [1954] 3 All ER 698.

18 *Geismar v Sun Alliance and London Insurance Ltd* [1978] QB 383, [1977] 3 All ER 570.

19 Cf automatic insurance: introduced in New Zealand by the Accident Compensation Act 1972, and Accident Compensation Amendment (No 2) Act 1973; Royal Commission Report *On Civil Liability and Compensation for Personal Injury* (Cmnd 7054-I).

20 *Honoré* pp 62, 63.

state shall provide basic subsistence. Professor Honoré speaks of 'advantages which are generally desired and are in fact conducive to their well-being ... I mean such things as life, health, food, shelter, clothing, places to move in, opportunities for acquiring knowledge and skill, for sharing in the process of making decisions, for recreation, travel etc. Men not only have a claim to these things but to an equal share in them'[1]. The two general points previously made are relevant here, namely, someone has to be vested with power to decide what claims need to be met and when they are satisfied, and there is the possibility that the satisfaction of these and other claims might whet the appetite for increased demands.

With liberties the problem is not one of equal distribution but whether *some* should be allowed at all, eg liberties to kill, maim, steal, and, if they are allowed, how their abuse can be prevented. In the unrestrained exercise of liberties lies the greatest threat to any scheme of distributive justice.

Powers are of various kinds. There should be equal distribution of some, eg power to contract, subject of course to obvious denials, eg to the insane. Other kinds of powers cannot in their nature be equally distributed, eg the power to decide what are basic needs, when they are satisfied and what is a just distribution. The question is, who should have such power? For instance, recent governments in Britain thought that a wages and incomes policy was a just way of staving off economic ruin, but many trade unions did not agree and on occasions thwarted the government. Karl Marx said that in the proletarian dictatorship distribution will follow the formula: 'From each according to his capacity, to each according to his work'; and in a communist utopia distribution will follow the formula: 'From each according to his capacity, to each according to his needs'[2]. Not only is it crucial to know who is to decide these matters, but also how that person is to evaluate capacities, work and needs. For instance, in the Soviet Union a certain dissident mathematician was not allowed to pursue his calling and he had to take a job of shovelling coal in order to avoid being convicted of being a social 'parasite'[3]. Is his capacity gauged as a mathematician or as a coal-heaver? If, as seems to be the case, it is the latter, is his capacity gauged on the basis of his contribution to society? The difficulty still remains of how one evaluates the contribution of a film-star, a coal-heaver, a dustman, or a person whose work has delayed or imperceptible effects, eg a teacher. Further, how does one evaluate the needs of, eg chefs, hospital porters or motor car workers? Finally, does giving people what they deserve according to their needs do away with pay differentials? If two persons have the same needs, should one be given a higher wage because he does a more dangerous or more skilful job than the other? The point is that decisions on such questions as these cannot depend on a formula and the allocation of power to decide them can hardly be determined on a principle of equality. To give it to one person is to court tyranny; to give it to all is not possible. With powers, therefore, the question of justice is not one of equal distribution, but of preventing their abuse.

The problem of the distribution of immunities is different from that of claims. Claims are demandable by all so that denial in a special case needs to be justified, whereas it is not denial but conferment of a special immunity that requires justification. There has been a progressive removal of special

1 *Honoré* pp 63, 82, 94.
2 See p 397 post.
3 See p 414 post.

immunities, eg those of the Crown and of public authorities. What calls for attention is the immunities claimed by trade unions. The original reason for these was the anxiety to preserve their slender resources from being paid out in damages. That reason no longer obtains with anything like the same force; so the question arises as to the justice in persisting with and, perhaps, widening their immunities.

Not only do power and liberty share the danger of abuse, but power, on the one hand, and immunity from power and liberty, on the other, are indissoluably linked as will appear. For these reasons the problem of power and liberty have to be treated as separate aspects of justice, distinct from the distribution of other advantages. Different ages have reacted differently to power and liberty, but have always regarded the issues raised by them as central. These have inspired various versions of natural law theory. In order to gain some idea of their complexity and importance it is necessary to review the changing attitudes towards power, immunity and liberty in a historical perspective.

SPIRALS OF HISTORY

Montesquieu pointed out long ago that power tends to be abused[4], and Lord Acton perceived with equal clarity that 'power tends to corrupt, and absolute power corrupts absolutely'[5]. It is not that wielders of power are inherently evil, but that they get caught up in the toils of power, which gets beyond their control. The contemporary tragedy of Pakistan illustrates this. The chaos into which political factions plunged the country after allegedly rigged elections was halted on 5 July 1977 by a military coup, which promised elections on 16 October and a return to democratic government. Supporters of the deposed President then kept fomenting such unrest that on 1 October it was announced that conditions had deteriorated to such a level that elections would have to be postponed indefinitely. Since then the government, which meant well at first, has found itself having to impose sterner and sterner measures until it has reached an even more unenviable position than its predecessor. In similar ways most holders of power are forced into resisting change, and as pressure for change mounts, are forced to resort to ever-increasing repression. Failure to adapt to change is as much an abuse of power as direct exercises of it. The result is that sooner or later people reach the point when they can stand the abuse of power no more and start agitating for freedom from power.

'Freedom' is a slogan charged with powerful emotive content, which has moved people to nobility, sacrifice and violence. Three meanings of the term should be distinguished. (1) Freedom from power (immunity), eg a freeman is one who is not under anyone's power. (2) Freedom to act and not to act (liberty), eg free speech implies the absence of duty not to speak[6]. (3) Freedom from disability (capacity, the acquisition of powers and liberties), eg coming of age. Aspects of this fall under head (1) or head (2), so it need not be discussed further.

Popular advocates of freedom fail to distinguish between freedom as

4 Montesquieu *L'Esprit des Lois* (1748) 11, 4-6.

5 Acton *Historical Essays and Studies* Appendix.

6 For a similar distinction, see Fuller 'Freedom—a Suggested Analysis' (1954-55) 68 Harv LR 1305; Isiah Berlin *Two Concepts of Liberty* (1958) pamphlet).

immunity and freedom as liberty. The two are linked, but distinct. Liberty to act implies absence of duty not to act; and duty is associated with enforcement and all the paraphernalia of power. Complete liberty cannot exist without complete absence of duty. Although linked in this way, the distinction is vital and much harm results from the loose use of 'freedom' wherein clamour for 'freedom from' power slides into clamour for 'freedom to' act as one pleases. To gratify a desire for freedom from power does not imply freedom to gratify every desire, and because of the failure to see this distinction the deliverance from the evil of abusive power so often ends in the evil of abusive liberty. In the words of Iris Murdoch:

> 'Freedom is, I think, a mixed concept. The true half of it is simply a name of an aspect of virtue concerned especially with the clarification of vision and the domination of selfish impulse. The false and more popular half is a name for the self-assertive movements of a deluded selfish will which because of our ignorance we take to be something autonomous'[7].

It is a sad paradox that the seeds of the abuse of power are sown in the bed of 'freedom'. Those who agitate most strongly for freedom from power are usually foremost in insisting, along with complete freedom of action for themselves, on the use of the utmost power to prevent others from going against them. Naturally they would not wish to see the cause for which they have striven being frustrated. They know, who better?, at what points they succeeded in bringing down the previous power-structure, so they know how best to stifle freedom of action against themselves at precisely those points; which is why the tyranny of those asserting freedom from tyranny is often worse.

Unrestrained freedom of action is the road to chaos. There comes a point in the breakdown of law and order which provokes increasing demand for power to restore stability. At first the call is generally supported by all who have grown weary of chaos. Indeed, it is an age-old tactic of revolutionaries to maintain constant disruption so as to produce just this reaction in order to smooth their own eventual accession to power. Then as memories recede and a new generation grows up, the now established power-structure becomes increasingly irksome and people, weary of power, start to agitate anew for freedom from it.

Striking the right balance between freedom from power and freedom of self-assertion has been a recurrent problem. The spirals of history show that the victory of freedom from abuse of power seems almost fated to end in abuse of freedom of action, which in turn calls for a return to power to keep it in check[8]. Such return is not to the same point as before; the slow march of societies has been a lurching spiral from one side to the other. The whole sorry tale is not a repetition, but goes on developing, like all great stories, as a supreme tragedy. Man just does not seem able to learn. Legal concepts of immunity, liberty and power cannot of themselves guarantee against their misuse, since they are only instruments of policy. Each society has to work out, and keep working out, the balance it wants between power, immunity and liberty. Whether the tide of opinion flows towards power or towards freedom from power and liberty depends on the social need of the age, which

7 Murdoch 'The Sovereignty of Good over other Concepts' *Leslie Stephen Lecture* 1967 (CUP) pp 31-32.

8 For illustration of an aspect of this, see Dietze *Two Concepts of the Rule of Law.*

has been reflected in variations of natural law theory. Such divergent interpretations should not condemn it, for they are necessary for a full grasp of what it has stood for, namely, as a support for power and stability amidst instability (or threat of it), or for revolution against power. In either case the need has had to be justified by appeal to ideals, whether derived from God or reason, other than the prevailing ones. It might even appear that natural law theory is always a reaction against force, whether it be the controlled force of tyranny or the uncontrolled force of anarchy.

Jewish theory

The Jewish doctrine, which is one of the oldest philosophies, possesses the insight to lay equal stress on immunity from power and restraint in action.

The Israelites learned the value of freedom from power during their enslavement under the Egyptians. They desired a society in which Pharaohs had no place, one which owed allegiance solely to God and was governed by His laws. Sovereignty resides in His law which, by virtue of its origin and intrinsic righteousness, cannot be altered by human institutions. So great, however, was the insistence on freedom that even this law had to be freely accepted by the people. The foundations of modern democracy and possibly the earliest version of the social contract, which was destined to play so prominent a part in later European thought would seem to lie here. The result was the theocracy, which is understood to date from the Exodus in the thirteenth century BC to the establishment of kingship with the anointing of Saul as King of Israel in 1037 BC. Its main features were the direct rule of God over the people and insistence on the independence of the individual. It was because the people were free that even the rulership of God was not imposed but had to be accepted by them, an occurrence, possibly hypothetical, which is said to have taken place in the covenant with Abraham[9], renewed with Isaac and Jacob[10], and later in the covenant with the people at Sinai. The covenant with God was needed because of Man's freedom. Independence resulted from his acceptance of God in place of dependence on any other human being or institution, not excluding the state. So sublime an assertion of human dignity could serve as a powerful means of protecting the individual against the power of the state. All this embodies the idea of a social contract transcending anything that was later evolved by European political philosophers, and holds up a pattern of voluntary restraint on the part of an omnipotent ruler. There had also to be acceptance of God as a legislator[11]. It follows that the appointment of Saul as king in 1037 BC amounted to a rejection by the people of God as their ruler: 'for they have not rejected thee, but they have rejected me, that I should not reign over them'[12]. Since Saul was understood to put God's law into effect, he was the Lord's anointed. Even so, the monarch's position was based on a contract with the people[13], and this relationship of the ruler to his subjects is of the utmost significance for democratic limitation of power and constitutional monarchy.

9 Gen 15.18.

10 Gen 26.3–5; Gen 28.12–16, 35.9–12; Deut 26.16–18.

11 Exod 19.3–8, 24.3, 7 (*quaere* whether 'be obedient' in King James's Bible is correct; cf 'hear'). See also chs 20–23.

12 1 Samuel 8.7–9.

13 1 Samuel 10.17–25; 2 Samuel 3.21, 5.3.

Yet, amidst these lofty assertions of freedom and independence, the dangers inherent in the abuse of liberty were not overlooked. So another outstanding feature of Jewish philosophy is its insistence on duties alongside its insistence on human freedom from power. Indeed, the liberties are ascertained with reference to the duties, for they are the residue that remain after the delimitation of duties deduced from the co-partnership between God and Man in developing the human race towards holiness. Modern theories, which reach towards the idea of the paramountcy of duties over 'rights', might well be compared with this early expression of the idea.

In these and other ways the concepts of Jewish law offer a striking contribution to jurisprudence. The answers to many problems of Christian Europe had already been worked out in Jewish philosophy. Thus, the relation between Church and state, which occasioned such bitter rivalry in Europe, was no new problem. The immortal words, 'Render unto Caesar the things that are Caesar's, and unto God the things that are God's', crystallised centuries of practical wisdom. Again, the Divine Right of Kings' would appear to be a reflection of the profounder Jewish idea of 'anointed of the Lord': but Jewish law, insisting as it did on the priority of duties, laid stress on obedience by the king to God's law and thus provided a safeguard against any 'right divine to govern wrong'. Jewish kingship began as constitutional monarchy.

The Greek period

Solon (c 638–558 BC) preached a doctrine of freedom from power, which arose out of the discontent of the poor owing to the tyranny of the rich and the Draconian Code. He was requested by all classes to deal with the social difficulties that had arisen and was invested with the title of *Archon*. His solutions laid the foundations of democracy. Every man should have a say in selecting those to whose rectitude and wisdom he is required to submit, and in this way it was hoped that civic power would be controlled by a sense of moral obligation and measured by public service.

The crucial factor in following later Graecian thought is that it unfolded in a setting of small city states presenting a picture of diversity and unstable equilibrium. Their development induced thinkers to speculate about the nature of the ordering that governed the relations of men. A group of such thinkers of the fifth and fourth centuries BC, the Sophists, distinguished between *φυσις*, nature, and *νομος*, law, the former being wise and eternal, the latter arbitrary and born of expediency. With regard to the latter, they developed a scepticism in which they recognised the relativity of human ideas and rejected absolute standards, and which was in its way an anticipation of some modern theories. The basis of law was said to be the self-interest of the law-maker, the only reason for obedience to law being the self-interest of the subject. Law was conceived of as being purely utilitarian and the product of expediency.

As against this, there was the view that law was guided by uniform principles, which gave it stability. Such a theory was more suited to the need of the age, which was stability, than the relativity of the Sophists, since it helped to preserve the *status quo*. This theory also offered a reason for obedience to law other than naked force or the self-interest of the governed, which was incompatible with social order.

The basis of this theory was somewhat as follows. Patterns of behaviour in Nature are not controlled by the objects which conform to them. A flower

does not choose its location, nor does a cat make moral decisions. They lead what might be called a 'natural' way of life. Man alone has developed powers of reason and will, by virtue of which he has insight into goodness and badness. He has the choice of developing in either direction, but he ought to devote his powers to developing according to a natural morality, that is to say, a moral, rational and social life. Socrates (c 470–399 BC) set out to urge the existence of immutable moral principles by which all regulation of conduct was to be judged. He refused to admit with the Sophists that human actions were solely governed by inclinations and desires and contended instead that Man possesses the faculty of 'insight' into the nature of conduct, this insight being a knowledge of goodness. Virtue is knowledge, and in this way he propounded a natural morality. He and his pupil Plato (428/7–348/7 BC)[14] with their firm assertion of the discoverability of absolute standards started European thought along a road which it still pursues. Man's insight, the knowledge of goodness, was the criterion by which all regulation and conduct must be examined. Here, already formulated, is the classical dissociation of actual law from ideal 'natural' law. At the same time Socrates went on to propound that one of the dictates of natural law was that authority and positive law should be obeyed. This was a plea for security and stability, which, as already mentioned, was the prime need of the age. This was why he refused to escape from imprisonment and faced death. It was only a short time since the irregular settlement of disputes had been replaced by orderly process; for him to have flouted the court would have been a step towards disorganising society[15]. He did not, however, advocate a blind acceptance of positive law; this, he said, has to be subjected to critical examination in the light of man's insight.

In Plato's ideal state each individual is assigned to the role for which he is best fitted by reason of his capacities. Rulership should be in the hands of philosopher-kings, who could be trusted not to abuse their power. In the absence of such, a state governed by law was the next best thing. Plato was no advocate of immunity from power since, in his view, men are unequal both in status and in their capacity for virtue. Subject classes should not deplore their lot on a supposition that they have lost freedom for servitude; on the contrary, they have exchanged subjection to wisdom for subjection to nature. Side by side with this Plato also preached restraint on freedom of action, which is an essential condition of virtue. Those restraints, which are necessary for the development of excellence, are also those that are essential to political association. People need to be educated in virtue, and it is the lot of the state to do this; to rule is to educate.

The work of Aristotle (384–322 BC)[16] needs special mention. Both the need for authority and restraint on freedom of action were stressed by him. Man is by nature a political animal. The family is instituted by nature for the supply of his daily wants, but for other and wider needs men unite in communities and ultimately in the state. The state is therefore the creature of nature to enable Man to realise the good life. Man is the measure of all things, there is nothing on earth superior to Man. Therefore, the best law for Man is the product of the best men. So men should strive towards perfection. Goodness, to his way of thinking, was the ultimate aim of existence.

14 *Republic.*
15 *Critic* 11, 50.
16 *Politics; Nicomachean Ethics.*

Communities and laws should seek to realise the good life, that is, living according to virtue. He distinguished between particular or positive law and law which is common or natural. The former consists of patterns of conduct regulating behaviour, and these are needed for imposing restraints on freedom of action. The mark of the worst governments, he said, is that they allow people to do as they please, and he condemned societies whose members acknowledge no restraint. Positive laws and fidelity to them are thus essential. At the same time it is not enough just to have laws; they must be just laws. Laws may be criticised, but the aim of this should be improvement, not disobedience. A just law is one which enables individuals to achieve the fullness of their nature in society. To rule is to educate, ie to develop subjects in the virtues with which they have been endowed by nature. It is an important task of the state to be the school of the citizen: 'Legislators make citizens good by forming habits in them'[17]. In this respect Aristotle held the same view as Plato. A just law, then, needs to be moulded in reason, unclouded by passion as well as intelligible. It is hostile to a tyrannous abuse of power and favourable to the proper sort of freedom, and the taming of power is the contribution of his *Ethics* and *Politics*. Freedom and good government go together.

There is also the other sort of law, a perfect law, which is discoverable and unalterable[18]. It is connected with the idea of development, and is inherent in the nature of Man as a potentiality of development; it develops with him as part of his [illegible], and it is present in the ultimate goal of his development. This perfect, or natural, law is thus universal in Man and capable of growth. It embraces citizenship and life in society, but slaves may not share in it, for they are only the adjuncts to the citizenship of their superiors in natural virtue. Thus, Aristotle did not advocate complete freedom from power, and he justified slavery on several grounds. In the first place, just as there are physical inequalities between men, so also there are spiritual inequalities. Thus, some people are by nature slaves and slavery is a natural institution. They are less deserving and capable[19]. War is justifiable in that it makes those who are by nature slaves into slaves. Secondly, men need leisure to cultivate virtue, and slaves provide this by relieving them of tedium. Thirdly, slaves for their part derive benefit through being guided by their superiors in virtue. Such a doctrine, it will be observed, avoided the disruptive tendencies implicit in the egalitarian ideas of the Sophists by harnessing natural law to the preaching of an acceptance of the *status quo*; slaves should accept their lot as a dictate of unalterable law. Nevertheless, Aristotle declared, virtue demands that masters should treat them with moderation.

The Roman period

Abstract philosophy played very little part in the practical outlook of the Roman lawyers, who were content for the most part to take over Greek

17 *Ethics* II, 1:5; *Politics* VII, 13-17. The biggest contemporary experiment along this line is that by the Soviet Union to re-educate the masses for communism (see ch 19 post). See also the dictum of Lord Simon in *Charter v Race Relations Board* [1973] AC 868 at 900, [1973] 1 All ER 512 at 527 (quoted p 51 ante); and the abolition of the death penalty in the face of opposition from at least a substantial, if not a majority, body of opinion might also be regarded as an example.

18 *Politics* I, 2.

19 *Politics* I, 5-7.

philosophy. The conditions of empire demanded a power-structure, but the *Corpus Juris Civilis* of Justinian has passages which might support almost any view. Statements of Ulpian, for instance, favour absolute power: the prince is not bound by law[20]; the wish of the prince has the force of law[1] On the other hand, two emperors, Theodosius and Valentinian, declared that their own authority derived from the authority of the law[2].

It was Cicero[3], an orator, not a lawyer, who referred to natural law as superior to positive law. He dwelt on Man's need for government and inquired into the basis of just government and the purpose and function of law. He argued that since divine reason was inherent in the universe, it was more or less identified with the physical ordering of the universe. Man stood highest in creation by virtue of his faculty of reasoning, and his welfare is thus the supreme purpose of creation. In the eyes of this universal law all men are equal, that is, in their possession of reason and ability to discover natural law. Moreover, Man is by nature sociable, and communion with others is made possible by language and reason. Since human welfare is the purpose of creation, men should spare no effort to help others.

Cicero recognised three forms of government, monarchy, aristocracy and democracy. Just as individuals have higher selves that control their ordinary selves, so also should society have a higher and permanent 'self' in the shape of a constitution. Law is the means of achieving just government, for the maximum liberty of action is best guaranteed by legal limitations. He struck off the ringing statement, 'we are slaves of the law in order that we might be free'[4]. He also recognised the need for freedom from the abuse of power, for he added that there are limits to the use of law as an instrument of power. It should be determined by what is sacred and just and be as far as possible a reflection of divine and eternal law as revealed through reason. He realised of course that positive laws had to be detailed and practical, but positive and natural law should not be in conflict. Shortcomings in the former require to be remedied by resort to the rational, social and moral norms of the latter. Natural law is 'right reason in agreement with nature'[5], from which there can be no dispensation either by the senate or the people. To run counter to or try to restrict it by legislation is immoral. This emphasis on Man's nature as the 'true' source of laws bore fruit in later times.

The chief interest of this period lies, not in the contribution of the Roman lawyers, but of the early Christians. Gleanings from the New Testament are unhelpful. There are certainly some clear affirmations of the need for civic authority[6]. On the other hand, when freedom as an absolute value is mentioned, the reference is to freedom of the spirit and freedom from sin[7], and something akin to the Ciceronian paradox appears in repeated statements that to be free is to be the servant of God[8].

The most important of the early Christian philosophers was St Augustine

20 *D* 1.3.31.
1 *D* 1.4.1.
2 *C* 1.14.4.
3 *De Republica*.
4 *Pro Cluentio* 53.146. (Cf Tacitus *Dialogues* 40: only fools identify liberty with licence to do whatever one likes.
5 *De Republica* III, xxii.
6 *Romans* xiii, 1-7; 1 *Peter* ii, 13-14.
7 *John* viii, 32 (cf 34, 36); II *Cor* iii, 17; *Romans* viii, 21.
8 *Romans* vi, 18, 20; I *Cor* vii, 22; ix, 19; *Eph* iv, 3; 1 *Peter* ii, 16.

(AD 345–430). Like many of the Christian fathers he was influenced by the pagan philosophers. They had emphasised the repression of the body and a concentration on things of the mind and soul. St Augustine, who had at one time been a professor of philosophy, preached that mankind had fallen from a state of nature and tended thereafter towards moral death from which the only hope of salvation is Christian grace. The tempting conclusion, which is only round the corner, is that the state of nature is now depraved and corrupt. Indeed, in the centuries which followed nature became synonymous with corruption, in which the body was a *saccus stercoris*, and the task of Man was to overcome by an intense asceticism the nature within him. St Augustine himself cannot be accused of any such inference. He constantly repeated that 'every creature, in so far as it is a part of nature, is good'. There is a distinction between the 'absolute' law of nature, representing the state from which Man fell, now beyond recall, and the 'relative' law of nature, related to the circumstances obtaining after the Fall. The Church, as the exponent of divine law, is entitled to interfere with institutions of positive law; and human law could be ignored if in conflict with divine law, for if it is not just it is not 'law': *lex esse non videbitur quae justa non fuerit*[9]. Had practical possibilities for putting this utterance into effect been worked out, it would have constituted a signal contribution towards preventing the abuse of power through unjust laws. As it stands, it is no more than a grandiloquent declamation. Indeed, it would seem that, on the whole, St Augustine was on the side of power and preservation of the *status quo*. For, apart from the vague privilege of the Church to interfere, institutions, such as law, government, property etc, are the products of reason, which have been devised to meet the situation brought about by original sin[10]. Although positive law is the product of sin, it is also a remedy for the evils of sin (*poena et remedium peccati*); and thus within limits is entitled to obedience. Another interesting feature is St Augustine's acceptance of slavery. Unlike Aristotle, he denied that any man was by nature a slave, since God's grace is distributed uniformly. Nor does he categorically state that slaves must somehow be more sinful than free people. What he does say is that slavery is a form of collective retribution for original sin.

The Medieval period

The social needs of the times were three-fold. The first, as in the early Greek period, was the emergence of some semblance of order from a long period of chaos. Hence there was need, not for freedom, but for power to preserve the newly won stability.

Secondly, there was need to establish the authority of the Church by reason and argument rather than force. Since the Church was intellectually pre-eminent, it fell to churchmen to propound a theory suited to both these needs. The available philosophical material, however, consisted largely of the works of the Greek thinkers. To take over heathen doctrines of natural law would have been inconsistent with the authority of Christianity and of the Church. The obvious solution, which was adopted in the famous *Decretum Gratianum* (c 1140), was to identify the law of nature with the law of God.

9 *De Libero Arbitrio* 1.5.7.
10 *Civitas Dei* ch 5.

The Church thus became the exponent of natural law. It was made possible by faith in the creation. Nature was the product of the will of God, and was regarded as conforming to the prescriptions of the ruler of the universe. Natural law, however, was much more than this: it covered also the rule of the Gospels that one should do as one would be done by. It is supreme and immutable and prevails over custom and enactment.

Thirdly, in these precarious times the produce of the soil was the main, and for most the only, source of subsistence, and men came to depend on landlords for land in return for specified services. In this way the power structure of feudalism, which made land the source and measure of power, stratified Europe into classes. There was an idea of unity, one Church, one faith, one realm, Christendom as opposed to heathendom (especially as the Holy Land was under heathen domination). The most comprehensive attempt to evolve a theory of law, which would harmonise the aims of the Church with contemporary needs, was that of St Thomas Aquinas (1224/5–1274) whose views will be considered later[11]. Suffice it to say here that his cosmic scheme made the Church the ultimate repository of authority in matters concerning 'eternal law' and its 'promulgation' to Man through reason, as well as the interpreter of 'divine law' as revealed in the Scriptures. Side by side with this he preached the significant precept that, although there is a duty to obey human laws in so far as they are reasonable, there is nonetheless a concomitant need to avoid social disruption, which demands compliance with the occasional unjust law. This clearly reflects the social need for stability. The best repository for power is what in modern parlance would be styled a constitutional monarchy, for a monarchy, rather than a republic, represents unity and resembles the rule of God, while its constitutional framework ensures protection from, or at least minimises, the danger of an abuse of power. If a ruler does abuse his power, he may legitimately be overthrown, provided this does not create as bad, or worse, state of affairs. The caveat reflects once more the need for stability.

In this way the Thomist system sought to uphold the authority of the Church, which was in a sense the first sovereign authoritarian 'state' in the western post-Roman world. There were, on the other hand, certain significant secular developments. Teutonic law stressed the fact that law belonged to the community, to the folk, and was thereby the common possession of every individual. Feudalism, in prescribing the duties owed by a vassal to his lord, inspired also the idea of 'right', for no more could be demanded of him than was due. Allied to ideas of Christian equality these left a legacy of freedom from power, which in later years led to parliamentary government and resistance to arbitrary authority, even of the Church itself.

The Reformation and the Renaissance to the Nineteenth Century

The result of the disintegration of the Holy Roman Empire was the replacement of the medieval idea of a united Christendom under the spiritual guidance of the Church by independent national states. The paramount need now was to free the national sovereigns from external authority and to consolidate power in their hands, since more and more strength was required to maintain independence in a world of increasing rivalry. Support for this movement came from various quarters. Individuals wished to free themselves

11 See pp 471–475 post.

from the Church and the shackles of the feudal system which had held Europe for so long in an iron grip, and in particular the rising commercial middle class wanted freedom to pursue its trade. The age of discovery and colonisation was at hand, and these enterprises were left to individuals, who had to be guaranteed liberty to carry on these activities. Individuals, therefore, found that a powerful sovereign was their best guarantee against interference, and the need was to foster the power of the sovereign.

Side by side with these developments natural law theory assumed a more secular aspect, brought about by a combination of factors. It was necessary to adapt theory to meet the above needs. Advances were also being made in knowledge about the physical operations of the material world. The Thomist system contained no scientific treatment of the movement and measurement of bodies and forces, and its exponents found themselves intellectually incapable of assimilating the new knowledge without some adjustment. The effect was not a rejection, but an adaptation of natural law theory. The Protestants denied that the Church had authority to expound the law of God, and in the controversy appeal to the law of nature as based on the reason of the individual came more and more into prominence. The intellectual world came to be actively engaged in the revived study of Roman law, which was now being adapted to meet contemporary local needs. This had two results. The diffusion of Roman law throughout different nationalities in Europe led to an association of it with natural law. It was revered as being supremely reasonable, the spirit of Rome still ruled the world by her reason. In this way the resources of Roman law were always on tap to supply the deficiencies of positive law; it also provided most of the material for constructing a system of international law. Secondly, the adaptation of Roman law had led to local variations. This fostered the belief that there was a 'natural law' which transcended its innumerable applications. The result of this belief was that the study of 'pure' Roman law became mainly an academic discipline[12].

Reflecting these developments and the call of a new age for sovereign power, theory tended to develop in the direction of justifying absolute monarchy. In this connection one thinks immediately of Machiavelli's *Prince* (1513), but his ideas are interesting chiefly on account of what he said in his other work known as *Discourses*. He characterised republics as being 'free' and superior to princedoms in that a high degree of virtue is required of people not to abuse freedom. To the extent that people lack virtue, they are 'corrupt' and have to be governed by a tyrant or prince, and in his *Prince* he elaborated absolute dictatorship. The state and its sovereign have to be supreme and subject to no external control, while moral and ethical principles need to be subordinated to political expediency.

In the hands of Thomas Hobbes (1588-1679), described as a belated medievalist, absolute sovereign power was justified by postulating an imaginary compact between ruler and ruled. In a state of nature everyone is entitled to everything; but this leads to friction. So Hobbes believed that Man's life in a state of nature was one of fear and selfishness. 'The life of man', in his own words, was 'solitary, poor, nasty, brutish and short'[13]. It is a fundamental dictate of the law of nature that people desire peace[14], so to

12 Cf Savigny's attitude: ch 18 post.
13 *Leviathan* ch xiii.
14 *Leviathan* ch xiv.

escape from the state of nature they entered into the social contract, whereby each surrendered his rights to a sovereign ruler, the Leviathan, who, in return for absolute subservience, guaranteed peace and greater security to each than he might otherwise have had. In this way natural law theory had come to support power[15]. It is important to remember that Hobbes lived through the Civil War in England, so his preoccupation was with stable and secure government. His doctrine reflects the idea that the security of the individual can only be found in the exaltation of the power of the sovereign. Liberty is not of men, but of the sovereign[16]. The menace to the individual from the sovereign is not faced. There is a suggestion that the sovereign is bound by natural law, but this is nothing more than a vague morality. The sovereign is expected to allow a harmless liberty, but there is no justification for resisting laws. There is no such thing as an iniquitous law; whatever is law is moral. Since society depends on the sovereign, law in society is what the sovereign commands: form rather than content becomes the determining feature of law. Although Hobbes was not concerned with protecting the individual against oppression by the sovereign, it was of the utmost significance that one precept of his natural law was the individual's entitlement to self-preservation. For herein lay the germ of a new view of natural law as a system of 'rights' in the individual. It is a far cry from the ancient idea of it as laying down duties. In Hobbes's scheme the authority of the Church as the interpreter of God's law is vigorously denied. All power is given to a severely utilitarian secular sovereign. This marked the final break up of the Catholic international order of things.

In this way national sovereigns acquired freedom from external power, but this was taken to imply complete liberty of action in their mutual dealings. Side by side with this they acquired also unfettered power over their own subjects. It was not long before the need arose to curb the abuse of liberties in international relations and the abuse of domestic power over subjects.

It has been pointed out that unlimited freedom to act as one pleases leads ultimately to chaos; and so it proved in the international sphere. Under the guise of the 'sovereignty of states' the unbridled pursuit of selfish policies reduced Europe to a state of barbarity culminating in the Thirty Years War. This abuse of liberty evoked increasingly loud cries for some power-structure whereby such freedom of action might be restrained. Voices, notably that of Hugo Grotius (1583–1645) started to preach the need for restraint[17], and a body of duties, known later as 'international law', began to be worked out in the hope of setting limits to the conduct of states. In his natural law theory Grotius was essentially a child of the time, but a feature of interest and significance in his writings is the shift in emphasis from Divine Providence to the reason of Man. He believed that natural law was rooted in the nature of Man, and would exist even if there were no God. This was not a denial of the Deity, but an assertion that natural law is independent of God and a quality of Man. The binding force of law is its essence. The problem is how men, supposed to be free, could fetter themselves. The answer was: by voluntary submission, by a social contract. Mutual promises have no obligatory

15 *Leviathan* chs xvii–xviii. Cf the Jewish social contract, which was in support of immunity from power.

16 *Leviathan* ch xxi.

17 *De Jure Belli ac Pacis, Prolegomena* 28.

force unless it derives from some rule giving such force to promises; and this rule is a rule of natural law. By virtue of it Grotius sought to explain the adoption of different forms of government by different societies. Reason impels Man to seek society. The state originates in a contract by virtue of which each individual surrenders his sovereignty to a ruler. The group has the liberty to choose the order which it prefers, but once it has chosen it loses all power to restrain its ruler. This was the way in which absolute power emerged. The subjects are bound to an almost blind obedience and only in exceptional circumstances did Grotius concede a liberty to revolt. The only guarantee which they have against an abuse of power by the ruler is that he is bound by natural law, which Grotius explained in these words:

> 'A dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity.'

The next, and more important, step was to restrain the absolute sovereign in his relations with other such sovereigns, for it was the absence of restraints that precipitated wars. Grotius accordingly went on to assert that nations were still in a state of nature and so bound by natural law. Man according to its fiat is a sociable being and desires peaceful society. For nations to assert their absolute independence was futile, and the sooner they realised that they, too, should unite to form a society of states the better it would be. It is these doctrines that have earned for Grotius the distinction of being styled the 'father of International Law'. He sought to establish international law on two foundations, the law of nature and consent. From natural law were deduced principles as to how states should conduct themselves, the idea of consent was utilised to infer rules from the observed practice of states. The difficulty about the latter is that one cannot derive an 'ought' from an 'is'; in other words, in view of the variety of reasons why different states at different times behave in a given way it is futile to propound a norm of behaviour. However, Grotius posited natural law as the principal foundation of international law.

In the municipal sphere the individual, who so fondly trusted his sovereign to deliver him from feudal oppression, soon found that he had only exchanged one tyranny for a worse. This gave rise to domestic struggles for immunity from the abuse of the sovereign's power. The age of the individual was now at hand, an age of commercial adventure and expansion, an age of trading middle classes. In support of this movement natural law doctrine was again called in aid. As early as 1581, when the Netherlands broke away from the overlordship of Philip II of Spain, it was declared in the Act of Abjuration that if a sovereign treats his subjects like slaves he ceases to be their rightful sovereign. In the succeeding age the mythical social contract theory was re-furbished by John Locke (1632–1704)[18]. The reign of the Stuarts in England had revealed what a menace the sovereign could be to the individual. So Locke evolved a theory to protect the individual. The state of nature, which preceded the social contract, was not one of anarchy, as Hobbes had imagined, but was 'a state of liberty, not of license'. It had, however, one defect, namely that 'property' was insecure and by 'property' was meant life, liberty and estate[19]. 'Every man has a *Property* in his own

18 Locke *Second Treatise on Civil Government* (1690).
19 *Locke* para 123.

Person', wrote Locke; and since the source of value lies in a man's labour, whatever a man 'hath mixed his *Labour* with, and joyned to it something that is his own' becomes his[20]. 'Property' in the sense described was insecure because (a) there was no established law, nor (b) an impartial judge, and (c) the natural power to execute natural law was not always commensurate with the claim. Executive powers were regarded as natural powers of a quasi-judicial character. To remedy this flaw Man entered into the social contract by which he yielded to the sovereign, not all his rights, but only the power to preserve order and enforce the law of nature[1]. The individual retained the 'natural rights' to life, liberty and estate, for they were the natural and 'inalienable rights of Man'[2]. This was an innovation of significance inasmuch as the idea of a natural law of society was transmuted into one of individual 'natural rights' which could be used to resist social control. The purpose of government was to protect these; it has no other end than 'to preserve the members of that society in their lives, liberties and possessions'. Its function is in the nature of a trust[3]; as Locke put it, all this 'is "*limited to the publick good* of the society" '[4]. So long as government fulfils this purpose, its laws should be binding. When it ceases to protect or begins to encroach on these 'natural rights', laws lose their validity and the government may be overthrown. In this way Locke championed the revolution of 1688-1689, and his idea that positive law might thus be overborne by natural law sustained the American colonists in their successful defiance of the British Parliament in the fateful years 1775-1781.

It is clear that in Locke's view unlimited sovereignty is contrary to natural law. The basic limitations are (a) that sovereign power cannot justifiably be used in an arbitrary fashion over the lives and fortunes of people. No individual enjoyed such power in the natural state and none could therefore be surrendered to the sovereign. (b) The sovereign may not rule by arbitrary decree, but only through known laws administered by known judges. (c) The people may not be deprived of their possessions without their consent. (d) The sovereign may not transfer the power of making laws to other persons. In order that the sovereign shall not abuse his authority Locke championed a constitutionally limited sovereign and a threefold division of governmental power[5]. Foremost there stands the legislative power for the creation of rules to give effect to and protect the 'inalienable rights'; secondly, there is the executive power by which the law is enforced; and thirdly, there is the 'federative' power, which concerns the making of war and peace and controls the external relations of the state. Locke thought it advisable to confer the legislative and executive powers on different organs, one reason being that the legislature does not, while the executive does, operate continuously, and another being the danger of entrusting law-makers with the power to carry out the laws which they themselves make. He did not advocate a similar separation between the executive and 'federative' powers since both are dependent on force. His views had considerable influence, for the climate of opinion was such as to make them acceptable. Not only was he hailed as the

20 *Locke* para 27.

1 Cf Pratt CJ: 'The great end for which men entered into society was to secure their property': *Entick v Carrington* (1765) 19 State Tr 1029 at 1066. Cf *Locke* para 124.

2 *Locke* para 135.

3 The idea of a trust was echoed in *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 182.

4 *Locke* para 135.

5 *Locke* ch xii.

intellectual defender of the English constitutional revolution of 1688-1689, but he also influenced the later American Revolution.

The problem of protecting the individual was not to be solved simply by curbing or destroying the sovereign, for power was only transferred from him to a faceless institution known as 'government'. One way of controlling power, whether exercised by sovereign or government, is to postulate the supremacy of law. Long before Locke, Chief Justice Coke (1552-1633) maintained this, and his view of law was essentially naturalistic. Law commands obedience, he said, by virtue of being reasonable; and it is in this context that his doctrine of the avoidance of even Acts of Parliament, which offend against common right and reason, has to be understood[6]. He also introduced an idea of profound significance when, in his famous disputation with James I, he insisted that even the king is under God and the law, and added that the reason of the law is not 'natural reason', but 'artificial perfection of reason, gotten by long study'. The implication of this is that kings and governments are controlled by the very special craftsmanship of the law of which judges, by virtue of their experience and practice, are the exponents. This made the judges the champions of the individual, and stresses the importance of an independent judiciary in controlling power.

Another way of controlling governmental power was put forward by the French philosopher Montesquieu (1689-1755), who purported to base his conclusions on the English constitution. The secret of its success, as he put it, lay in the fact that power was not concentrated in the hands of an individual or group. Unless power is made to check power, it will be abused. An essential prerequisite is that general rules should be laid down in advance of actual situations, but even so there remains the real possibility of abuse if the person laying down the general rules were also allowed to apply them and then carry out his own decisions. So the guarantee against abuse lies in establishing mutual checks between the legislative, executive and judicial functions[7]. All that his doctrine of the 'separation of powers' insists on is the danger of an absolute union of these functions in one person or body. It does not require their respective allocation to three distinct organs with no inter-relation between them. The functions may well be shared as in England, for instance, where the cabinet, which is the executive centre, is an integral part of the legislature and responsible to it; executive departments have legislative functions entrusted to them; justices of the peace perform judicial and executive functions. Montesquieu's doctrine is carried furthest in the United States of America, where the separation is guaranteed by a Constitution, guarded by the courts. The federal legislative power is vested in Congress, the federal executive power in the President and his cabinet; and the federal judicial power in the Supreme Court. A very great deal of inter-relation exists, which enables them to work harmoniously

In France the continuing need to protect the individual against an oppressive monarchy found expression in the theory of Rousseau (1712-1778), in which the idea of the social contract underwent yet another revision. Rousseau set out to evolve a community in which the community as such

6 *Bonham's Case* (1610) 8 Co Rep 114a.

7 Montesquieu *L'Esprit des Lois* (1748) 11, 4-6. It is commonly supposed that Montesquieu based his views on the British system. For the view that he was really arguing what ought to obtain in France and that he used Britain as a façade for avoiding domestic censorship, see Merry *Montesquieu's System of Natural Government* (1970).

would protect the individual; but in which at the same time the individual would remain free from oppression. All should participate in policy-making. Accordingly, he argued that in the original contract the individuals did not surrender their rights to any single sovereign, but to society as a whole, and this is their guarantee of freedom and equality. Society, having come into being for this purpose, is expected to restore these rights to its members as civil liberties. Their basis is a moral one. Each individual is not subject to any other individual, but to the 'general will'[8], and to obey this is to obey himself. Government and law are both dependent upon general will, on popular as distinct from parliamentary sovereignty, which may revoke or overthrow them. Enacted law is necessary to avoid arbitrariness, and to get law right to begin with public servants should apply the 'general will' so that law will produce just results[9]. Little wonder that this theory was utilised as the philosophy of the French Revolution in order to get rid of the monarch. Yet again the pattern of history was repeated. Deliverance from the evil of uncontrolled sovereign power only led to the evil of uncontrolled popular liberties as manifested in the excesses of the Revolution; which in turn called for a return to power in Napoleon.

The same sad swing can be detected in Germany[10]. The nineteenth century saw the unification of the Germanic states, which stimulated an upsurge of nationalistic fervour. Although there was some talk of a 'Law State' (*Rechtsstaat*, constitutional government), the trend was towards the glorification of imperial power. The reaction against this after World War I came with the Weimar Republic, which was a 'national-social state'. On the one hand, its socialist character required a planned economy, which meant concentrating power in these matters in government. On the other hand, the extremely permissive attitude adopted by government in its reaction against the authoritarianism of the past allowed disruptive and revolutionary freedom to flourish to the point of eventually reducing the country to economic and social chaos. Little wonder that there was general support for the return to a power-structure under Adolf Hitler to restore stability. There is no need to dwell on the way in which that power was subsequently abused[11]. After World War II West Germany became a 'republican, democratic and social Law State'[12]. Its socialist character requires concentration of power in government in economic planning, but at the same time, as with the Weimar Republic, extreme sensitivity to the excesses of the Hitler régime has induced a permissive attitude towards disruptive movements.

The Soviet Union provides a vivid example of the power-freedom-power swing. The Revolution was a successful bid for freedom from the power of the Czars. In its wake the revolutionary leaders immediately claimed for themselves unlimited freedom to act as they chose, untrammelled by codes or laws[13]. More significantly, they have established an infinitely more ruthless power-structure, rooted in a new ruling class of the Communist Party, which brooks no opposition in any shape or form. This was required, among other things, to stifle all contrary values, which are condemned as 'counter-

8 Rousseau *The Social Contract* (1762, Everyman's Lib) pp 13-15.
9 *Rousseau* pp 26-27.
10 See generally Dietze *Two Concepts of the Rule of Law*.
11 See p 387 post.
12 Bonn Basic Law, art 28.
13 See ch 19 post.

revolutionary', and also to carry out a long-term programme of mass re-education of the populace in the values of communism. The lengths to which the Soviet Union is prepared to carry this power is seen in the way in which she intervened to crush libertarian stirrings in Hungary in 1956 and in Czechoslovakia in 1968.

There have been other power-structures which have filled many people all over the world with misgiving. Traumatic experiences such as these have induced at times an almost hysterical reaction against power and, indeed, any call for law and order. It has the unfortunate result of blinding people to the alternative dangers of the abuse of liberty through overweening permissiveness. The need to prevent this abuse is at least as great as the need to prevent the abuse of power. Democracy was a device to prevent the latter. Even among a small group of people, as long as the person in authority enjoys their trust, they will be content to leave power in his hands. Once he loses it through wickedness or mismanagement, they will feel driven to demand a say in their own government, either personally in the case of very small groups, or through representatives in the case of large groups. Representation dilutes democracy, unavoidably in the nature of things, and it leaves democratic processes of election and decision open to manipulation by those in quest of power. By means of propaganda and by taking advantage of the apathy of the majority, who do not attend meetings, or by shouting down opposition, they manage to vote themselves on to bodies, which then use the votes of these few as block-votes to represent the whole constituency. Having won power in this way, they seldom risk losing it by allowing any reference back to the constituency on a one man one vote basis. Although such processes as these are claimed to be democratic, they are a perversion of democracy. Apathy may deserve what it gets, but election through the apathy of the majority is not election *by* the majority.

Democracy is workable as long as there is a substantial area of shared values and aspirations among the people and where they have the maturity to rise above differences[14]. Once this willingness to 'rub along together' disappears and differences become irreconcileable, (eg with racial or religious divisions), and fragmentation reaches the point of pluralism without a cohesive substrate, then government through democratic participation becomes precarious, if not impossible. For it may then not be possible to reach majority decisions, and, even if it were, one section or other may refuse to abide by them[15]. The uncomfortable question arises whether democracy itself is only an intermediate stage in the doom of society, beginning with loss of confidence in a tyrant and ending in anarchy. The answer is that it need not be. The message coming through history is that to break out of the melancholy spiral of power and liberty a way must be found of curbing both rather than promoting either[16]. This, it would seem, is the paramount need of the present age in its quest for justice.

14 Cf Machiavelli *Discourses*, and p 79 ante.
15 Eg Northern Ireland.
16 Lord MacDermott *Protection from Power under English Law* p 195.

READING LIST

Aristotle *Nicomachean Ethics* (trans H Rackham) V.
Aristotle *Politics* (trans J E C Weldon) I, chs 1–7.
E Bodenheimer *Jurisprudence* chs 1, 3, 11.
J M Brown 'A Note on Professor Oakeshott's Introduction to the *Leviathan*' (1953) 1 Political Studies 53.
E N Cahn *The Sense of Injustice.*
W Friedmann *Legal Theory* (5th edn) chs 2, 7–12.
J W Gough *The Social Contract.*
H Grotius *De Jure Belli ac Pacis* (trans F W Kelsey) I, paras 10–17.
T Hobbes *Leviathan* (ed M Oakeshott) and M Oakeshott's Introduction.
A M Honoré 'Social Justice' in *Essays in Legal Philosophy* (ed R S Summers) 61.
J W Jones *Historical Introduction to the Theory of Law* ch 4.
H Kelsen 'What is Justice?' in *Essays in Legal and Moral Philosophy* (ed Ota Weinberger) 1.
J Locke *Two Treatises of Government* (ed P Laslett) II.
Plato *The Laws* (ed E B England) I and II.
K R Popper *The Open Society and its Enemies* I (5th edn).
R Pound *An Introduction to the Philosophy of Law* chs 1–2.
R Pound *Justice According to Law.*
M S Shellens 'Aristotle on Natural Law' (1959) 4 Natural Law Forum 72.
J Stone *Human Law and Human Justice* chs 1, 2, 8, 10, 11.

CHAPTER 5

The problem of power

Power has two connotations. One is physical force, but this, however great, is inert in itself. It can be dangerous only when exercised, and juridically its exercise is often a matter of liberty to do so or not. The problem of curbing the abusive exercise of physical force is, therefore, the problem of curbing liberty of action, which will be discussed in the next chapter. Power has the other connotation of legal capacity to alter jural relations and this is the sense in which the problem of power is considered here and, even so, only the supreme power of making laws will be dealt with. Abuse of this power by government may be designated 'rule by law' where laws are used as instruments of government policy. 'Rule of law', by contrast, is the use of law, among other things, to curb the misuse of law-making power by government.

The abuse of 'rule by law' manifests itself in the passing of unjust laws. The supreme legislative authority in Britain being the Crown in Parliament, in order to prevent an unjust statute from being treated as 'law', it would be necessary to include a criterion of just quality in the requirements for the validity of a statute in addition to purely formal criteria. The point is that on purely formal criteria an unjust enactment, however heinous, is 'law' provided the requisite procedures have been observed and majorities obtained. The addition of a moral quality of justness is designed to ensure that an enactment is not 'law' merely because it has been passed in due form. Any such suggestion with regard to an Act of Parliament would be dismissed by practically every lawyer as fantasy, quite apart from the immense problems and practical difficulties in the way of its implementation. The purpose of this chapter is to consider the suggestion and the problems and difficulties, even if the conclusion may be to leave the suggestion where it is—as a fantasy.

The idea is not new. The words of St Augustine may be recalled: *lex esse non videbitur quae justa non fuerit*[1]; as well as those of Sajjad Ahmad J: 'A law is not law merely because it bears that label. It becomes law only if it satisfies the basic norms of the legal system of the country [enshrined in the Qur'an] and receives the stamp of validity from the Law Courts'[2]. On the other hand, British courts accepted Acts of Parliament as supreme in 1689 and, as suggested in the last chapter, the change over from the supremacy of the prerogative was to ensure, among other things, that the Crown in Parliament would be a bulwark against the passage of unjust laws like some of those enacted under the prerogative. Notwithstanding the revolutionary nature of the change, the judges' refusal to challenge Parliament by questioning the validity of the new state of affairs enabled them to preserve their independence as well as a measure of power the limits of which have never been defined. The latter manifests itself in relation to the unresolved question as

1 *De Libero Arbitrio* 1.5.7.

2 *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 261.

to who decides what constitutes a valid 'statute' and in their power to interpret statutes. As will appear, this power has a part to play when the problem of preventing the abuse of legislative power to be considered.

In the past there have been utterances, both before and after 1689, suggesting that courts could treat as 'void' (but which probably meant no more than side-step or ignore) legislation which contradicts reason or is otherwise repugnant[3]. Such sayings, however, especially after 1689, come from highly suspect reports[4]. At least one modern British judge has expressed a similar view. Lord Cross, alluding to a confiscatory decree of the Nazi Government of Germany, said:

> 'To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all'[5].

The significance of this remark should not be over-estimated, for there is a difference between the application of such a consideration to the discretion, which judges have, with regard to the recognition of a foreign decree and to an Act of Parliament. What is noteworthy is the thinking behind it.

Notwithstanding such dicta, the traditional attitude of judges is to accept Acts of Parliament as unchallengeable, and the following statement of Ungoed-Thomas J is characteristic:

> 'What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal'[6].

One by-product of this doctrine is that a statute never ceases to be 'law' through disuse. There used to be an idea that an Act need not be applied if it has never been enforced[7], but this is no longer true. There is no doctrine of desuetude[8]. The courts are thus debarred from reacting against the unfairness of applying even an out-of-date statute. In defence of the existing position it might be observed that there are difficulties about desuetude. The period of time varies with the subject matter and complications could well arise in the case of statutes embodying dissimilar material. Moreover, non-application of a statute may be the result of non-violation rather than obsolescence. A statute may indeed expire if there is provision in it to that effect, eg the annual financial legislation and the Armed Forces Acts; and if

3 Coke CJ in *Bonham's Case* (1610) 8 Co Rep 114a; Holt CJ in *R v Earl of Banbury* (1693) Skin 517 at 527, and in *City of London v Wood* (1701) 12 Mod Rep 669 at 687.

4 Coke himself emphatically asserted the supremacy of Parliament elsewhere: 2 Inst *Proemium*. Cf Blackstone *Comm* I, pp 90-91, 160-161.

5 *Oppenheimer v Cattermole* [1976] AC 249 at 278, [1975] 1 All ER 538 at 567. So, too, Lord Salmon 'the decree in my judgment should not be recognised by our courts as having any effect in English law for any purpose': at 284, and at 572. See also Lord Hodson at 265, and at 557.

6 *Cheney v Conn* [1968] 1 All ER 779 at 782, [1968] 1 WLR 242 at 247. See also Willes J in *Lee v Bude and Torrington Junction Rly Co* (1871) LR 6 CP 576 at 582; *R v Jordan* [1967] Crim LR 483 where the court refused to entertain the argument that an Act was void as curtailing free speech; *British Railways Board v Pickin* [1974] AC 765, [1974] 1 All ER 609 where the House of Lords held that a court cannot investigate whether an Act had been procured by fraud.

7 *R v Bishop of Lincoln* (1345) YB 19 Edw 3 (Rolls Series) 170, rejected in *Stewart v Lawton* (1823) 1 Bing 374 at 375.

8 Eg *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, [1957] 1 All ER 49.

the manner in which a statute is to terminate has been specified, it will come to an end only in that way[9]. Another by-product is that Parliament is not bound by a prior Act, which it can always repeal, even by implication, and even though the prior Act had been declared unrepealable[10].

Such being the attitude of British judges, a heavy onus lies on those who contend for a moral check on legislative power to show why this is necessary, and how it can be achieved. With regard to the question why, the following points should be considered. Laws are not just things of the moment, but enduring phenomena. Just quality is a factor of endurance, which means that, in a long view, that quality needs to be taken into account *now*[11]. Also, it is not true to say, as some positivist philosophers do, that nothing is gained by refusing to call an unjust enactment 'law', for there are the emotive associations of that word which work powerfully in influencing public reaction. Thus, one positivist has contended that clarity and honesty might be gained by keeping the juristic and moral issues separate. To accord validity to an unjust enactment, so he argues, does not imply moral approval of it, namely, that 'might is right', but only that it is 'law'. Moral disapproval can be signified by a refusal to obey[12]. The allusion to disobedience betrays a weakness in this argument, for it overlooks the emotive associations of the word 'law', which induce obedience and cast on would-be dissidents the onus of justifying disobedience. Added to this is the fact that the coercive apparatus of the state can be invoked in support of that which is styled 'law'. The whole point of calling a thing 'law' is to evoke a realisation that obedience is called for and that the force of authority lies behind it. This is why fidelity to laws is enhanced by just quality as much as it is weakened by the lack of it. Even formal criteria of validity were often accepted initially because they were thought to guarantee justice, as pointed out earlier. The attack might even be carried into the positivist camp, for positivism itself is grounded in a belief that there shall continue to be an in-built justice in the accepted criterion of validity. When this assumption breaks down, as it did repeatedly in Nazi Germany, then law-quality based on formalism alone becomes suspect. 'The capricious orders of a crazy despot', said Pollock, 'may be laws according to Austin's definition until they are revoked; but if so, it is the worse for the definition'[13]. The positivist attitude enables régimes like that of Nazi Germany to establish themselves through the grossest injustices becoming accepted as 'laws' simply because they satisfy some formal criterion. Finally, even a doctrine such as the 'Rule of Law' becomes a betrayal of the individual if all it means is that formally valid laws shall be administered impartially, for there is neither hope nor comfort in the impartial application of oppressive and degrading rules[14]. It is for such reasons as these that people press for some means of controlling, not just the form of enactment, but its very substance.

9 *Willcock v Muckle* [1951] 2 KB 844, [1951] 2 All ER 367.

10 *Vauxhall Estates Ltd v Liverpool Corpn* [1932] 1 KB 733; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590. Cf *Krause v IRC* [1929] AD 286 (SA).

11 Different considerations will have to apply to temporary but oppressive laws, eg in an emergency. The problem here lies in deciding what constitutes an 'emergency'.

12 Hart *The Concept of Law* p 203, quoted at p 355 post.

13 Pollock *Essays in Jurisprudence and Ethics* p 50.

14 Mr Justice Schreiner argued in his Hamlyn Lectures, *English Law and the Rule of Law in South Africa* Part II, that South Africa today is under a rule of law, on which see the comment of Lazar in his review in (1968) 31 MLR 582.

Apart from the need to do so, the practicalities of achieving a moral check on power present formidable difficulties. Whose moral sense is to count? and, How can any check be made practicable? With regard to the first question, the answer clearly cannot be the moral sense of legislators, for the object of the whole exercise is to protect the community from the immoral values of legislators. Nor could it be that of the community itself, which is too diffuse and whose opinion is likely to be divided and, in any case, cannot be readily ascertained. What remains is some independent and impartial control. This raises the preliminary problem of working out an objective and acceptable moral code. Sets of principles, which may be used as models, are to be found littered throughout history in sundry Bills of Rights, Declarations of Human Rights, Fundamental Freedoms etc. The problem of working out a set of principles cannot be divorced from the question who is to do this, and also the precise manner in which they can be put into effect. As a prelude to such an exercise it is suggested that the following principles might be helpful as a guiding framework. First, power must not be exercised exclusively for the advantage of the power-wielders[15]. Secondly, power must not be exercised so as to exclude, or accord unequal treatment to, another from society by reason of race, religion or opinion without special justification, which, whatever it is, must not infringe any of these principles. Thirdly, in exercising their power, power-wielders must conform to accepted procedures. These may be spelled out in 'due process' clauses, or they may be conventional; but, whichever it be, power-wielders must not go against the way of going about things accepted in the community[16]. Fourthly, no exercise of power should be beyond independent scrutiny and question[17]. Fifthly, power-wielders are not immune from compliance with their own dictates. Sixthly, power-wielders must not become a closed circle, ie the door must be open for participation by other members of the society. Professor Honoré includes as his first proposition of social justice 'opportunity ... for sharing in the process of making decisions'[18]. Eligibility to participate has to be worked out with care. Some of the considerations that would be relevant are: (a) the degree of permanence of the involvement in the particular society, eg whether in a state or in a university, or as a citizen or alien. The more transient the involvement, the more need there is to pay attention to the balance between the desirability of participation and the stability and continuity of the society. (b) The voluntariness or involuntariness of the involvement. If it is voluntary, then

15 Eg arguably the action of the late Indian Prime Minister, who, having been convicted of certain offences involving disqualification from Parliament, procured the passing of retrospective legislation validating the acts before the Supreme Court heard the appeal.

16 It has been pointed out, rightly, that 'process values' have hitherto been largely neglected: Summers 'Evaluating and Improving Legal Processes—a Plea for "Process Values"' (1974) 60 Cornell LR 1. His list of ten such values (pp 20-27) relate to evaluating legal process as a good process and is relevant to the whole question of power-wielding processes.

17 Eg *Congreve v Home Office* [1976] QB 629, [1976] 1 All ER 697. See also the Watergate scandal in America where the President attempted to evade scrutiny; dicta in *Mir Hassan v The State* Pak LD (1969), Lah 786 at 808 (quoted at p 92 post). The problem of protecting workers against their unions becomes insoluble if unions have their way in operating outside a legal framework. To say that workers need no protection other than that provided by their union is no answer to the problem of protecting them against the power of the union. The argument that unions exist to protect and not to abuse them might be countered by reference to such cases as *Bonsor v Musicians' Union* [1956] AC 104, [1955] 3 All ER 518; *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367; and several others.

18 Honoré 'Social Justice' in *Essays in Legal Philosophy* (ed Summers) at p 63.

the conditions, if any, attaching to membership of the society are relevant. (c) The nature of the society and the relation between its members. Should participation be forced on members? (d) Ability of participants to contribute, eg depending on the issue, their age, experience, skill etc.

The practical difficulties of introducing a moral control on unjust enactments concerns the methods and agencies through which this might be given effect. Judicial control of the abuse of power will be considered first.

JUDICIAL CONTROL

This has serious limitations of which judges themselves are well aware. 'Judicial review', said Lord Brightman, 'is concerned, not with the decision but with the decision-making process. Unless that restriction on the power of the courts is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power'[19]. There are, however, certain ways in which judicial control can and does operate. With regard to subordinate legislation, courts may invoke certain principles and doctrines in order to invalidate exercises of power, eg by invoking the principles of natural justice or due process. With regard to Acts of Parliament themselves, something can be accomplished as part of daily business by interpreting statutes so as to obviate or minimise their effects. There is no doubt that wherever possible courts of all countries will prefer this course to the more drastic one of holding statutes void. Since the technique of interpretation applies to all statutes, whether thought to be just or unjust, it will be postponed for consideration in another context[20].

Two other methods are important enough to merit extended discussion. One is to resort to the historical context in order to utilise the moral basis on which a legislative authority came to be accepted as a check on its power. The other is to invalidate an enactment on the ground that it had not been passed in the appropriate manner and form. There is nothing to prevent even British courts from adopting this course should opportunity arise: courts are not here declaring that a statute acknowledged to be such is void, but that it is not a statute at all.

Historical context

A colourable case can be made out for saying that the moral and other reasons for the acceptance of a new law-constitutive medium become built-in limitations on its competence. What is odd is the manner in which these come to be sloughed off. In Britain the revolution of 1688–1689 was essentially a protest against the abuse of legislative power by the monarch; the revolt of the American colonies was a protest against the abuse of legislative power by the British Parliament. In both cases new power-structures were accepted because they were thought to provide guarantees against certain abuses, and it is therefore arguable that such guarantees become limitations on the power of the new structures. In fact, Sir Matthew Hale used this very

19 *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141 at 154, [1982] 1 WLR 1155 at 1173.

20 See ch 8 post.

argument in answer to Hobbes's view of unlimited sovereign power[1]. In South Africa the union of the four provinces by the South Africa Act 1909 was on the understanding that minority rights would be safeguarded. Honouring that compact could thus be made a condition of the validity of legislation by the Union Parliament[2]. Another example is the Bonn Basic Law of West Germany, article I, which declares that the German people acknowledge fundamental human rights; and the succeeding article provides that the legislature is powerless to contravene the specified rights. The Federal German Constitutional Court has said of these that 'They are referred to in the *Grundgesetz* as inviolable and inalienable human rights; not as guaranteed by the Constitution, but as existing before it and independently of it'[3]. The implication is that these rights do not derive their force from the Constitution, but from the circumstances in which West Germany was established after the collapse of the Hitlerite régime. So, too, in *Maharaj v A-G of Trinidad and Tobago (No 2)*[4] the Judicial Committee of the Privy Council held that chapter I of the Constitution of Trinidad and Tobago 1962 protected individuals against infringement of rights by the state, which were declared by section I to have been in existence prior to the Constitution. Another interesting example is that of a Pakistani judge, who used the historical context to strike down a piece of legislation by the revolutionary government, and he was fearless enough to do so while that government was still firmly in power. Referring to the avowed basis on which it came into power, the learned judge said:

> 'Martial law was imposed, therefore, with the declared purpose of "restoring sanity", "restoring and saving the country from internal disorder and chaos" and to "ensure that the administration resumes its normal functions to the satisfaction of the people" ... No one, including the Chief Martial Law Administrator, can transcend or deviate from the sole purpose of restoring law and order and democracy and it needs no gainsaying that curbing the jurisdiction of the established judiciary is not a step in that direction'[5].

In a later case the Supreme Court of Pakistan made a broader, and more emphatic averment to the same effect. 'Our own *Grundnorm*', said the Chief Justice,

> 'is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm (as embodied in the Qur'an) which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949 ... It is under this system that the Government becomes a Government of laws and not of men, for, no one is above the

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1 'Sir Matthew Hale on Hobbes: an unpublished manuscript', published by Pollock and Holdsworth in (1921) 37 LQR 274, on which see in more detail Yale 'Hobbes and Hale on Law, Legislation and Sovereign' [1972B] CLJ 121. See also Fuller *The Morality of Law* pp 137-139.

2 On this see McWhinney 'The Union Parliament, the Supreme Court and the "Entrenched Clauses" of the South Africa Act' (1952) 30 Can BR 692; *Judicial Review in the English-speaking World* ch 6; Keith *The Dominions as Sovereign States* pp 167-183.

3 Bundesverfassungsgericht 51; see also 3 B Verf G 231; Rommen 'Natural Law in the Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany' (1959) 4 Nat L Forum 1; Pappé 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 MLR 260.

4 [1979] AC 385, [1978] 2 All ER 670. See also *De Freitas v Benny* [1976] AC 239.

5 *Mir Hassan v The State* Pak LD (1969) Lah 786 at 808, per Mushtaq Hussain J.

law. It is this that led Von Hammer, a renowned orientalist, to remark that under the Islamic system "the law rules through the utterance of justice, and the power of the Governor carries out the utterances of it"[6].

On this basis the Supreme Court unanimously declared two successive governmental régimes illegal.

A historical control of this kind, however, may suffer from the weakness that it does not go far enough. Thus, the object of the revolution of 1688–1689 was to provide a guarantee against the abuse of power by the prerogative by transferring power to the Crown in Parliament; but this is no safeguard against abuse of power by the latter, which was why the American colonies revolted. The compact between the provinces in South Africa was designed to protect minority rights. Does it forbid *apartheid*? Again, a particular historical context may even enshrine what some may regard as an abuse of power. Thus, the Rhodesian revolution of 1965 occurred because the minority white population wished to deny to the African majority a share in the government. The historical context here would have justified perpetual denial. Other objections are that it might have the ill-effect of impressing a past morality too strongly on the present and so hold back development to suit a different outlook. Also different historical interpretations of events might yield different moral bases; and it may not always be possible to discover a moral basis. The conclusion to be drawn from all this is that the historical context is not a firm enough weapon with which to attack legislation. It is by no means fanciful, however, since it can be and, indeed, has been used.

Manner and form

As an indirect method of controlling legislative power the 'manner and form' check is open to British courts because the question who decides what constitutes a 'statute' has never been decided. Parliament cannot bind itself not to repeal a statute; but the point is whether it is bound to observe a particular procedure in order to pass one. Any requirement as to what constitutes a 'statute' necessarily precedes every statue, for it is this that invests an enactment with that character. It is not of itself a limitation on the substance of an enactment, but prescribes how the power of enactment may be effectively exercised[7]. The one will, however, imply the other whenever there is a provision to the effect that certain things can only be done after a special procedure has been followed[8]. In any case, disregard of appropriate procedures is more likely to occur in passing oppressive or unpopular measures.

The existing requirements for an Act of Parliament are a simple majority in the House of Commons and in the House of Lords and the Royal Assent[9].

6 *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 182. See also Yaqub Ali J at 235, Sajjad Ahmad J at 258, Salahuddin Ahmed J at 264, 267.

7 *Bribery Comr v Ranasinghe* [1965] AC 172 at 198–200, [1964] 2 All ER 785 at 792, 793.

8 Ibid. For the presumption that an Act has been properly passed, see *Akar v A-G of Sierra Leone* [1970] AC 853, [1969] 3 All ER 384.

9 *Pylkington's Case* YB 33 Hen fo 6 17 pl 8. See also *Prince's Case* (1605) 8 Co Rep 1a; *College of Phisitians v Cooper* (1675) 3 Keb 587. A Bill before Parliament is not a 'statute': *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 All ER 567, [1956] 1 WLR 213. In making a *discretionary* order a court may take into account a forthcoming change in the law: *Clifford Sabey (Contractors) Ltd v Long* [1959] 2 QB 290, [1959] 2 All ER 462. Cf *Wilson v Dagnall*, [1972] 1 QB 509, [1972] 2 All ER 44. A resolution of the House of Commons is not 'law': *Bowles v Bank of England* [1913] 1 Ch 57. Even in times of political stress Parliament

Parliament can of course alter these requirements and introduce some new manner and form for legislating[10]. Suppose that it passes an Act to the effect that all future legislation shall be passed by at least a two-thirds majority in each House. It is clear that a future Parliament can, by observing this two-thirds majority rule, rescind it and restore the rule of a simple majority.

The question is whether a future Parliament can by a simple majority repeal the two-thirds majority rule. Would such an enactment be a 'statute'? Sir Ivor Jennings said no, and denied that Parliament is competent to do this. It is a rule of law, he argued, accepted by the judges, that statutes are enactments made by the Monarch and passed by simple majorities in the Lords and Commons; and this rule, like any other, is alterable. If, then, a statute, passed in the accepted way, substitutes a different procedure for legislating, the law has been altered and the judges will be bound by the new law. An enactment which does not thereafter conform to the new procedure will not in law be a 'statute'[11]. Sir Ivor added that the only escape from this conclusion is to maintain that the statute, which originally effected the alteration, is void, which would be absurd. Parliament is in this way able to bind a future Parliament to observe a particular manner and form.

Professor H W R Wade has challenged this reasoning. He points out, in the first place, that the question is not whether the original statute is void, but whether it is repealable. No statute, he says, can declare itself to be unrepealable: which is undeniable. The point is whether it can be repealed by an enactment passed otherwise than in the prescribed manner and form[12]. Professor Wade contends that Parliament does not have to comply with that requirement because at rock bottom there lies the principle, which no statute can establish or alter, that the courts will always enforce the latest statute, in other words, the later statute will always, by implication if need be, repeal an earlier[13]. The weakness in this argument is that it begs the question by assuming that the later enactment is a 'statute'. Professor Wade appears to be supported by Sir Owen Dixon of Australia, who has argued that the common law is the source of Parliament's authority, in other words, that the doctrine of parliamentary supremacy is a rule of common law. Constitutional questions of the sort under consideration should accordingly be resolved in the context of the whole of the law of which the common law is an important part[14].

On the other hand, the opinion of the Judicial Committee of the Privy Council in *Bribery Comr v Ranasinghe*[15] would appear to have endorsed Sir Ivor Jennings's view. Section 29 (4) of the Ceylon (Constitution) Order in

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has observed the requirements. On occasions the assent of the House of Lords has been obtained by the creation of, or threat to create, peers, eg passing of the Treaty of Utrecht, Reform Bill 1832; Parliament Act 1911.

10 In *Moore v A-G for the Irish Free State* [1935] AC 484, the Privy Council held that the Irish Parliament, while conforming to such requirements as to manner and form as were necessary, could repeal s 2 and amend s 50 of its own constituent Irish Free State Constitution Act 1922. See also *Bribery Comr v Ranasinghe*, [1965] AC 172 at 197-198, [1964] 2 All ER 785 at 792.

11 Jennings *The Law and the Constitution* ch 4.

12 It might be observed that one reason why the XII Tables in Rome acquired their unalterable sanctity was that the very special machinery which produced them was never set up again: Buckland *The Main Institutions of Roman Private Law* p 3.

13 Wade 'The Basis of Legal Sovereignty' (1955) CLJ 172.

14 Dixon 'The Common Law as an Ultimate Constitutional Foundation' (1957-58) 31 ALJ 240.

15 [1965] AC 172, [1964] 2 All ER 785.

Council 1946, requires that any Bill amending or repealing the Constitution should be certified by the Speaker as having been passed by no less than two-thirds of the whole House of Representatives. Section 55 secures the independence of the judiciary by vesting the appointment of judges in the Judicial Service Commission. The Bribery Amendment Act 1958, s 41, provided that members of Bribery Tribunals, established under the Act, were to be appointed by the Governor General on the advice of the Minister of Justice; but there was no certificate of the Speaker in accordance with s 29 4) of the Constitution. Both the Supreme Court of Ceylon and the Judicial Committee had no difficulty in holding that members of Bribery Tribunals were judicial officers and that the 1958 Act purported to amend the Constitution. Since the established procedure had not been followed, those provisions of the Act which conflicted with the Constitution were invalid. 'Once it is shown that an Act conflicts with a provision in the Constitution, the certificate is an essential part of the legislative process. The court has a duty to see that the Constitution is not infringed and to preserve it inviolate'[16].

In this important case no question arose of a conflict between the legislature and the courts. It does not therefore touch on a deeper issue underlying the debate between Sir Ivor Jennings and Professor Wade, which is this. Granting that the situation envisaged has arisen, the vital question is:

(a) is it for Parliament to decide as a matter of its own internal procedure what constitutes a 'statute', or

(b) is it for the courts to decide this as a matter of law; in brief, is it for Parliament to dictate to the courts what a 'statute' is whenever occasion arises, or is there a testing right in the courts[17]?

These questions determine how 'statute' should be defined, and what the conditions of validity are. The answer would follow on (a) that a 'statute' is simply what the legislature says is a statute, notwithstanding any provisions that may exist as to procedure or voting majorities. Such provisions are not then conditions of validity, no part, in other words, of the rule defining a 'statute'. On the other hand, it would follow on (b) that a 'statute' is something that has to satisfy certain conditions, and on this basis provisions as to procedure or voting majorities would become part of the conditions of validity. Where the requirement for legislating is a simple majority, there is no reason for bringing to the surface the issue between (a) and (b), which is why the point has never been determined in this country[18]. Only when the requirement is anything other than a simple majority is the question likely to arise. When viewed in this way the difference of opinion between Sir Ivor Jennings and Professor H W R Wade becomes explicable. Sir Ivor's argument, now supported by the Judicial Committee, is founded on assumption (b), namely, that the courts decide what a 'statute' is as a matter of law. For

16 [1965] AC 172 at 194, [1964] 2 All ER 785 at 790. For a presumption that it has been properly passed, see *Akar v A-G of Sierra Leone*, [1970] AC 853, [1969] 3 All ER 384. In *A-G of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 1037, [1979] 3 All ER 129, the Privy Council said that the amendment of an entrenched section of the Constitution without going through the proper procedure was void.

17 It will be noticed that during the first three years of the Rhodesian rebellion the courts firmly maintained that they alone were competent to decide what legislation they would accept as 'laws', and the government accepted this contention inasmuch as it submitted to the jurisdiction of the courts in the matter.

18 As observed in *Bribery Comr v Ranasinghe* [1965] AC 172 at 125, [1964] 2 All ER 785 at 790.

it is then clear that the courts are bound to declare that an enactment, which does not conform to *their* definitive rule, is not a 'statute'. Professor Wade's contention, on the other hand, appears to proceed on assumption (a), namely, that it is for Parliament alone to decide what is a 'statute' as a matter of internal procedure; for only on this basis is it possible for him to maintain that an enactment, which fails to conform to some existing rule as to manner and form, could nevertheless be a 'statute'. The crucial decision, therefore, is between questions (a) and (b).

The argument that legislation will be invalid unless it conforms to the requirement as to manner and form, however this may be expressed[19], is attractive. In other words, it is for the courts to test the validity of legislation. Arguments the other way also merit consideration. One way of maintaining that Parliament may still control what constitutes a 'statute' is to say that once an enactment has been enrolled on the Parliamentary roll it is a 'statute' as far as the courts are concerned, save perhaps where an irregularity is apparent on the face of the record itself. Such a rule would enable Parliament to decide as and how it pleases what a 'statute' is simply by enrolling an enactment as such, notwithstanding any requirement as to manner and form. There are some judicial statements suggesting that the roll is conclusive[20], but none is wholly convincing. The argument only raises the issue between (a) and (b) in another form: is the condition of the validity of a 'statute' simply enrolment, or is the requirement of manner and form itself a condition? It might even be asked, quite apart from manner and form, whether the assent of the Monarch, the Lords and the Commons is a condition of validity or not. For one interpretation of the enrolment rule might be that a statute is such on enrolment notwithstanding the fact that one or other of these parties had not signified its assent. On the other hand, the rule could mean only that, granting that the main conditions of validity are fulfilled, the courts will not inquire into minor rules of procedure and the like which are not themselves conditions of validity, such as the triple reading of Bills, or whether an Act had been procured by fraud[1]. In none of the cases alluded to was there any doubt as to the fulfilment of the constitutive requirements. Would the judges, who appeared to have accepted the enrolment rule, still have upheld it had the assent, for example of the Commons, been wanting? That they would have done so is at least doubtful, and therefore their *dicta* should not be generalised. It is thus equally doubtful that they would have supported the enrolment rule when some special provision as to manner and form had not been observed. Maitland, for one, entertained doubts about the scope of the enrolment rule[2].

Another way of putting the matter is to argue that Parliament exercises

19 When this is laid down in a constitution the position is clear; cf *McCawley v R* [1920] AC 691, and *A-G for New South Wales v Trethowan* [1932] AC 526, and see Evershed MR in *Harper v Secretary of State for the Home Department* [1955] Ch 238 at 253, [1955] 1 All ER 331 at 339. See also *R v Military Governor NDU Internment Camp* [1924] IR 32, where the Irish court declared an Act of the Irish Parliament to be invalid because it failed to conform to the required manner and form. The South African case of *Harris v Minister of the Interior* 1952 (2) SA 428 (A) illustrates the same point.

20 Notably *Edinburgh and Dalkeith Rly Co v Wauchope* (1842) 8 Cl & Fin 710 at 724-725. See also *R v Countess of Arundel* (1616) Hob 109; *Lee v Bude and Torrington Junction Rly Co* (1871) LR 6 CP 576 at 582.

1 *British Railways Board v Pickin*, [1974] AC 765, [1974] 1 All ER 609.

2 Maitland *Constitutional History of England* pp 381-382.

exclusive jurisdiction over the regulation of its own internal affairs[3], including the entire legislative process. This, too, is not convincing, since the question would then be how far the privilege of Parliament extends. Is this particular rule, which requires some special procedure or majority, merely a matter of internal procedure or a rule of law? In the one instance in this country where a special procedure may be employed, namely, under the Parliament Acts 1911–1949, there is a specific rule which deprives the courts of any testing right by making the Speaker's certificate conclusive that the appropriate procedure has been followed[4]. It would be unsafe to generalise from this somewhat special type of situation. Indeed, it might even be argued that where there is no definite provision like this the courts do automatically have a testing right; for if not, a rule denying them such a right is meaningless. In the South African case of *R v Ndobe*[5] the Appellate Division rejected the contention that a rule prescribing a particular manner and form for legislating was to be likened to regulations controlling the internal proceedings in Parliament or that the parliamentary roll was conclusive. In *Bribery Comr v Ranasinghe*[6] the Judicial Committee held that the Speaker's certificate was a necessary part of the manner and form of legislation amending the Ceylon Constitution. In its absence enrolment and the presentation of an official copy of an Act is no substitute. 'If Parliament could not make a bill valid by purporting to enact it, it certainly could not do so by reprinting it, however august the blessing that it gives to the reprint'[7].

It will be seen that none of the above considerations is decisive. The solution will have to be sought in the acceptance of one or other of the alternatives posed above, for which purpose considerations outside law will have to be resorted to. The first decision to be made is whether it is desirable that the judiciary should have the power to review the validity of legislation. It might be borne in mind that freedom of the individual means, *inter alia*, freedom from the law-maker, be it monarch or legislature. The judiciary has traditionally safeguarded the individual from oppression by the former; should it not be a bulwark against the latter as well if need be? To this it might be objected that an elected legislature is in power with the approval of the people, and that judges are not elected. Popular approval, however, is a vague idea. It might be conceivable with reference to some specific issue, but hardly as to the details of general administration. Besides, the difficulties arise not so much as to the approval with which a legislature comes into power, but as to how long it might be said to continue to enjoy it. If the power of judicial review is thought to be necessary, then this would weigh in favour of proposition (b), given earlier, rather than (a). It cannot be

3 *Bradlaugh v Gossett* (1884) 12 QBD 271; *Bilston Corpn v Wolverhampton Corpn* [1942] Ch 391, [1942] 2 All ER 447; *Harper v Secretary of State for the Home Department* [1955] Ch 238, [1955] 1 All ER 331 (the two latter cases refused an injunction). Cf *Clayton v Heffron* (1960) 34 ALJR 378, where the Australian court similarly refused to issue an injunction and declared that *Trethowan's Case, ubi sup.*, which allowed an injunction, was wrong on this point. None of these cases touch on the question whether the requirement as to manner and form is simply a matter of internal procedure.

4 Parliament Act 1911, s 3. Cf *Akar v A-G of Sierra Leone* [1970] AC 853, [1969] 3 All ER 384.

5 1930 AD 484 (SA), now upheld by *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *contra*, *Ndlwana v Hofmeyr NO* 1937 AD 229 (SA), not followed in *Harris's Case*.

6 [1965] AC 172, [1964] 2 All ER 785.

7 [1965] AC 172 at 195, [1964] 2 All ER 785 at 791. For the power of the courts to interfere with the conduct of members of a colonial legislature when deliberating a measure, see *A-G of Hong Kong v Rediffusion (Hong Kong) Ltd* [1970] AC 1136, [1970] 2 WLR 1264.

emphasised too often that the need to decide between them has not arisen because no conflict has occurred between Parliament and the courts. The apparent docility of the judges in 1689 was deceptive: they sided with Parliament as against the prerogative. By not flaunting their independence of Parliament they preserved to themselves a considerable degree of power the limits of which have never been defined. The fact that the issue has not arisen should not obscure the historical fact that the present position of Parliament and its victory over the prerogative rested on the acceptance by the judges of its authority. Should a conflict now arise between Parliament and the courts, the choice between (a) and (b) will have to be made by the electorate, whose decision will largely be governed by the political *milieu* in which the reference to them is made.

The point has arisen in other jurisdictions. With regard to Scotland the opinion was expressed in *MacCormick v Lord Advocate*[8] that Parliament may be incompetent to alter the Act of Union 1707, since this is in a sense a 'fundamental law'. In relation to the Dominions the Statute of Westminster 1931, s 4, declares that no British statute shall apply to a Dominion 'unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof'. Such request and consent are arguably part of the special manner and form for legislating for the Dominions. If the British Parliament were to repeal s 4 unilaterally, the question whether this would be valid depends on whether it is for Parliament or the courts to decide what constitutes a 'statute'. Viscount Sankey in a dictum said that theoretically such repeal would be valid[9], but Dominion judges have said otherwise[10]. Even accepting that statutes for Dominions require an extra condition of validity, there might be some doubt as to what exactly this is. Must the Dominion concerned in fact have assented, or is it sufficient for the statute merely to recite that it has done so, however untrue this may be? The wording of s 4, read literally, could support the latter view[11]. If, on the other

8 1953 SC 396, per Lord Cooper; cf Lord Russell at 417. It may be noted that in the Universities (Scotland) Act 1853, Parliament did repeal a provision which had been declared to be fundamental in the Act of Union. See also the repeal of the fifth article of the Union between Britain and Ireland, also stated to be fundamental, by the Irish Church Act 1869.

9 *British Coal Corpn v R* [1935] AC 500 at 520. Cf Danckwerts J in *Re Brassey's Settlement, Barclay's Bank Ltd v Brassey* [1955] 1 All ER 577 at 580.

10 Thus, a South African judge, Stratford ACJ, said: 'Freedom once conferred cannot be revoked'. *Ndlwana v Hofmeyr NO* 1937 AD 229 at 237 (SA); and see Lord Denning MR in *Blackburn v A-G* [1971] 2 All ER 1380 at 1382. The Australian case of *Copyright Owners Reproduction Society v EMI (Australia) Pty Ltd* (1958) 32 ALJR 306, came near to the point. In *Re Cunningham, ex p Bennett* (1967) 86 WN (Pt 2) NSW 323 at 328, another Australian judge was clear that a British Act not complying with s 4 would not be law in Australia. See also Dixon 'The Law and the Constitution' (1935) 51 LQR 590, and Hanks 'Re-defining the Sovereign: Current Attitudes to Section 4 of the Statute of Westminster' (1968) 42 ALJ 286. With regard to Northern Ireland the Ireland Act 1949, s 1(2), provides that no part of Northern Ireland shall cease to be part of the United Kingdom without the consent of the Parliament of Northern Ireland. Heuston has argued that without such consent a British Act is invalid: 'Sovereignty' in *Oxford Essays in Jurisprudence* pp 220–221. With regard to Rhodesia it should be noted that Rhodesia remained a colony so that the British Parliament had full legislative power. The convention, which was embodied in s 4 of the Statute of Westminter, was not in statutory form as regards Rhodesia, and the British Parliament is not bound by mere convention. Besides, the act of rebellion arguably released Britain from her obligation to continue to observe it: *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 723, [1968] 3 All ER 561 at 573. The Rhodesian courts refused to accept this interpretation and defied the ruling: *R v Ndhlovu* 1968 (4) SA 515 at 525.

11 *Manuel v A-G* [1983] Ch 77, [1982] 3 All ER 786, 822. Cf where a certificate of the Speaker is said to be conclusive and not open to question by a court: Parliament Acts 1911–1949.

hand, the condition is understood to mean actual assent, then it cannot be dispensed with by mere declaration. Whatever the view taken by British courts, the view of Dominion courts is too obvious to need mention.

In South Africa the issue between Parliament and the courts arose squarely in connection with the 'entrenched' clauses of the South Africa Act 1909, which can only be repealed or altered by a two-thirds majority of both Houses of the Union Parliament sitting together[12]. Early in the 1950s the Government sought to place the Cape coloured voters on a separate electoral roll. Such a change could only be made by a two-thirds majority according to the South Africa Act, but the disenfranchising statute was passed by only a simple majority. The Appellate Division held this void as well as a subsequent statute purporting to create a 'High Court of Parliament' for deciding issues of this nature[13]. The nub of the dispute was that Parliament maintained that it alone decides what constitutes a 'statute' and that the courts must accept what it says, while the Appellate Division maintained that the courts decide this. Eventually by the Senate Act 1955 the number of senators was increased so as to provide the necessary two-thirds majority and the South Africa Act Amendment Act 1956, ending the entrenchment of voting rights, was passed in accordance with the South Africa Act[14]. The Government, in effect, bowed to the Appellate Division.

It would seem, therefore, that the manner and form control could be effective, but the occasions for its use are likely to be rare. A powerful government will be in such complete command as to be able to carry out its policies with a scrupulous adherence to procedure, so the manner and form control will be of least avail when most needed.

As against all this, there are several drawbacks to judicial control of power. Whatever form such control may assume, its success depends on judges being independent of those wielding the power. Independence means far more than immunity from interference; it means that they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of government. For there can be no protection against abuse of power, even when safeguards are enshrined in a written constitution, if the judges who have to interpret these whenever the government is challenged are only puppets of government. In this respect there lies a distinction be-

12 There has been some debate as to whether or not the validity of these clauses depended on the Colonial Laws Validity Act 1865, so that with its repeal in 1931 the clauses ceased to be entrenched. The respect that continued to be paid to them after 1931, even by Nationalist governments, suggests that they remained valid. The Conference on the Operation of Dominion Legislation 1929 (Cmd 3479) para 67: 'In the case of the Union of South Africa the exercise of these powers is conditioned only by the provisions of s 152 of the South Africa Act 1909'; and this was approved by the resolution of both Houses of the South African Parliament. See also the assurances in 1931 by the Nationalist Prime Minister and others (see House of Assembly Debates, April 22 1931, col 2738-2739, 2746); and the statement by the Speaker in 1934 (see House of Assembly Debates, April 25 1934, col 2736). In 1936 Act 12/1936, providing for a separate roll for Africans, was passed as stated in the recital 'in accordance with the requirements of sections thirty-five and one hundred and fifty-five of the South Africa Act 1909'. In *Krause v IRC* 1929 AD 286 (SA), it was held that an Act of the South African Parliament could impliedly alter any part of the South Africa Act, except the 'entrenched' provisions.

13 *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

14 *Collins v Minister of the Interior* 1957 (1) SA 552 (A). Schreiner JA dissented on the ground that the artificially enlarged body which passed the 1956 Act was not a 'House of Parliament' within the meaning of the South Africa Act, but merely a piece of political jerrymandering.

tween so-called 'totalitarian' and 'free' countries. In the former the task of the judge is that of reflecting an official set of values; in the latter he has to weigh these against others which may be opposed to them–a more difficult task[15]. A feature of this independence is the way in which the judiciary can switch, overnight if need be, to supporting official values, as in times of crisis[16].

The British judiciary has enjoyed a long tradition of independence. When Chief Justice Coke told King James that the King was under God and the law, he meant the reasoning and values of the common law which requires special expertise and of which the judges are the experts. In the conflict between King and Parliament ending in the revolution of 1689 the judges sided with the latter, so there was no cause for Parliament to suppress them. In this way their independence was preserved and it has now become a cherished tradition. Had they opposed the new order, the position would have been vastly different. The Rhodesian revolution provided a different example. It would appear that the judiciary there played a clever political game; while the government was asserting its independence of Britain, the judges were tacitly asserting their independence of the government so as to prevent the judiciary from being engulfed by the emotional and political tides unleashed by rebellion. They did so by refusing unanimously to recognise the régime as legal and by continuing in this attitude for nearly three years until the Appellate Division, the highest court in the land, had a chance of saying so too. Thus, Lewis J at first instance declared uncompromisingly:

> 'The only course open would then be the drastic one of filling the vacuum by replacing all of the existing judges with revolutionary judges, who, regardless of judicial conscience, would be prepared to accept without question the 1965 Constitution as the *de jure* Constitution of this country, despite the ties of sovereignty and despite the anomalies in the Constitution itself to which I have already referred. ... Once a judge appointed under the 1961 Constitution were to yield to this threat and to swear an oath to uphold the 1965 Constitution, knowing full well it was not the law, he would no longer remain an independent judge; he would become a craven hireling of the executive'[17].

Once the Appellate Division had made clear its own views, the courts then came round in a series of rapid steps to accepting the rebel régime as legal[18].

15 Churchill, HC Debates, March 23 1954, col 1061; Denning 'The Independence of the Judiciary' (1950) Presidential Address to the Holdsworth Club; Lord Denning and Salmon LJ in *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210 at 1245, 1261, [1964] 3 All ER 354 at 361–362, 372; *Liyanage v R* [1967] AC 259, [1966] 1 All ER 650; *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874; *Van der Linde v Calitz* 1967 (2) SA 239. Parliamentary indignation over the *Burmah Oil Co Case* [1965] AC 75, [1964] 2 All ER 348, shows how far removed judicial values were from those of government.

16 In politically immature and emergent countries, which are in the course of evolving their values and of winning acceptance of them, judicial independence dare not be allowed beyond a certain point. For the position in South Africa, see p 99 ante. See also Harvey 'A Value Analysis of Ghanaian Legal Development since Independence' (1964) 1 UGLR 4.

17 *Madzimbamuto v Lardner-Burke* GD/CIV/23/66, Government Blue Book, pp 24, 36. See also Yaqub Ali J in *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 229.

18 For a brief account, see Dias 'Legal Politics: Norms behind the *Grundnorm*', [1968] CLJ at 251–253, to which has to be added *R v Ndhlovu* 1968 (4) SA 525 (A), decided on 13 September 1968 when the Appellate Division finally accepted the régime as legal.

In this way they made it abundantly clear to the government that its legality depended, not on effectiveness, but on the judges saying so[19].

The power of even the most independent judiciary suffers from the weakness that the assertion of values contrary to those of government can only be carried up to a point. All judges will ultimately be helpless in the face of ruthless power. The cynical Hobbes had a keen appreciation of the point when he said: '... in the matter of government, when nothing else is turn'd up, Clubs are Trump'[20]. It is true that this is an extreme situation and before it is reached there is still something that an independent judiciary might accomplish[1]. Another obvious weakness of judicial control is that judges can only act when cases come before them, which means that the principles on which they will operate have to be evolved piecemeal rather in the way in which equity was developed. Such a process is bound to take time, whereas the need to prevent the abuse of power is too urgent for that. This objection might be avoided by having a constitution, perhaps with a Bill of Rights annexed, and guaranteed by the judiciary[2].

Finally, it is questionable whether the judiciary should be used at all for these purposes, which cast judges into a political arena. Moreover, the judicial process of fact-finding and the application of rules is not geared to such matters. Against this it might be pointed out that even the normal process of deciding disputes does import an element of discretion guided by value-judgments as between competing social, individual, governmental and other interests[3]. The difference in the kind of discretion is one of degree, and it becomes a matter of opinion as to whether this is large enough to warrant keeping such questions away from the judiciary.

If, as would appear from the above, judicial control is inadequate and possibly undesirable, it is necessary to consider other ways of preventing the abuse of power. To call in aid the concept of duty not to exercise power in any particular way is not within the sphere of practical politics. It is not possible to impose duties on sovereign legislatures, which have the liberty to enact what they please. As pointed out earlier, the problem becomes one of curbing the abuse of liberty. The nearest approach to the utilisation of the duty concept is to be found in *Teh Cheng Poh (alias Char Meh) v Public Prosecutor, Malaysia*[4], where the Judicial Committee of the Privy Council held that although the proclamation by a ruler, made under statutory power, declaring a specified area to be a security area remained valid until revoked, nevertheless it was an abuse of the ruler's discretion not to have exercised the power of revocation once he considered that the proclamation was no

19 For possible justification of the judicial attitude deriving from an implied provision in the old constitution, or from natural law, or from a moral or social duty to the populace, see Honoré 'Reflections on Revolutions' (1967) 2 Ir Jur (NS) 268.

20 Hobbes *Dialogue between a Philosopher and a Student of the Common Laws of England* sv 'Punishments' p 140.

1 Eg in Rhodesia the revolutionary régime had power to remove judges who refused to swear allegiance to the new constitution. Yet at no time during the three years when the judges refused to accept the régime as legal did it dare to invoke this power. To have done so would have been politically damaging.

2 Powerfully advocated by Lord Justice Scarman in his Hamlyn Lectures *English Law—The New Dimension* pp 76 et seq.

3 See ch 10 post. Perhaps the 'manner and form' check on power is the most mechanical of those that have been considered.

4 [1980] AC 458, [1979] 2 WLR 623.

longer necessary for the purpose for which it was issued. It was held further that, although the ruler was immune from court proceedings, an order of mandamus could be sought against members of his cabinet requiring them to advise the ruler to revoke the proclamation, which implies that they were in breach of their public duty.

The concept of disability provides a more feasible method of controlling legislative power than duty, ie no power to enact unjust laws. By way of analogy it might be noted that there is a disability to create an immoral contract, any such agreement being void. Likewise, it is through disability that the *ultra vires* doctrine operates to limit the power of subordinate legislatures. At these levels there can be disability controls on power, but the step from them to that of sovereign legislatures is very large. Hitherto the most effective way in which this can be, and has been, accomplished is by means of written constitutions.

WRITTEN CONSTITUTION

In countries which possess written constitutions the legislatures are bound by the constitutions and courts can declare statutes invalid on the ground that they are unconstitutional. Montesquieu saw clearly the dangers of power. 'It is the experience of history', he said, 'that power tends to be abused, so power must be used to check power'. The guarantee against its misuse lies in establishing mutual checks between the legislative, judicial and executive functions[5]. What his doctrine of the 'separation of powers' insists on is the danger of an absolute union of these functions in one person or body; it does not require their respective allocation to three distinct organs with no interrelation between them. The functions may well be shared, as in Britain where the cabinet, which is the executive centre, is an integral part of the legislature and responsible to it; executive departments have legislative and 'quasi-judicial' functions entrusted to them; justices of the peace perform judicial and executive functions. What is crucial is the independence of the judiciary[6]. The paradigm example of Montesquieu's doctrine is the United States of America, where the separation is guaranteed by the Constitution, guarded by the courts. The federal legislative power is vested in Congress, the federal executive power in the President and his cabinet, and the federal judicial power in the Supreme Court; and a great deal of inter-relation exists between them.

An interesting Commonwealth illustration is *Liyanage v R*[7]. The appellants were charged with participation in an abortive *coup d'etat*. By the Criminal Law (Special Provisions) Act No 1 of 1962, the legislature sought retrospectively to legalise their prolonged imprisonment without trial, to create *ex post facto* a new criminal offence so as to cover the situation of the abortive *coup*, to alter the law of evidence so as to render admissible much that would otherwise have been inadmissible, and to prescribe a minimum penalty. All

5 Montesquieu *L'Esprit des Lois* 11, 4-6.

6 Where there is a separation of powers guaranteed in a constitution, it is the function of the judiciary alone to interpret the law: *Chokolingo v A-G of Trinidad and Tobago* [1981] 1 All ER 244, [1981] 1 WLR 106.

7 [1967] 1 AC 259, [1966] 1 All ER 650. See also *Hinds v R* [1977] AC 195, [1976] 1 All ER 353.

these remarkable provisions applied only to these appellants and to the circumstances of the *coup*. By another Act a special tribunal, nominated by the Chief Justice, was established to try the case, and this, with reluctance, held itself bound by the legislation. The Judicial Committee of the Privy Council, however, declared the legislation to be invalid because it infringed the doctrine of the separation of powers, which was part of the then Constitution. It was argued that the vesting of the judicial function in the judiciary, as distinct from the legislature and the executive, had occurred before the promulgation of the Constitution, which had continued that state of affairs. Any attempt by the legislature to usurp the judicial function was, therefore, *ultra vires*. Of course, the Constitution might be altered so as to permit this to be done, but that had not occurred. The Judicial Committee was careful to indicate that the legislation was invalid, not because it was *ex post facto* and *ad homines*, but because the nature of the legislation, considered as a whole, constituted a usurpation of the judicial function. The *ex post facto* and *ad hominem* character of the legislation merely showed that the Acts were, in the words of an American judge, 'Legislative judgments, and an exercise of judicial power'[8].

A written constitution provides probably the most effective of all checks on legislative power, but a contrary effect is that, while a constitution may limit legislative power, it may thereby prevent government from dealing with the abuse of liberty, which could be as undesirable as the abuse of power[9]. In any case, the success of a constitution depends on a number of factors. One of the most important is the language in which the limitations are expressed, whether in fairly specific terms or in generalities open to divergent interpretation. Secondly, the safeguards may be effectively cancelled by countervailing provisions elsewhere in the document[10]. Thirdly, if the constitution can be easily amended, a restraint which the government finds irksome will not impose quite such a curb as when the procedure for amendment is complex and elaborate. An interesting case is *Golak Nath v State of Punjab*[11], in which the Supreme Court of India declared that the Indian Parliament was incapable of amending the Constitution so as to abridge or remove fundamental rights. Fourthly, every constitution has to be interpreted, so the effectiveness of its restraints rests ultimately on the interpreters, ie the judges and the measure of their sympathy with and independence of government[12].

A compromise might be a 'non-justiciable Bill of Rights' along the line adopted in a former Rhodesian Constitution[13]. When a measure, usually one

8 Per Chase J in *Calder v Bull* (1789) 3 Dallas USSC 386. Cf *Kariapper v Wijesinha* [1968] AC 717, [1967] 3 All ER 485, where the Act was held to be legislative rather than judicial and did have the effect of amending the Constitution.

9 Eg the First Amendment to the United States Constitution, which inhibits the use of legislative power to curb some of the grossest abuses of liberty, such as anti-social monopolies. See also *New York Times Co v US* 403 US 713 (1971).

10 Hiemstra 'Constitutions of Liberty' (1971) 88 SALJ 45 (comparing the American and German Constitutions).

11 [1967] 2 SCR 762.

12 The American Supreme Court is a good example, eg its obstruction of New Deal Legislation in the 1930s. Cf more recently *Brown v Board of Education* 347 US 483 (1954); *New York Times Co v US* 403 US 713 (1971) ('Pentagon Papers' case).

13 Cf the Protection of Human Rights Bill 1971, introduced into the British Parliament, but which did not get beyond a second reading. It provided for a Commission of Human Rights, which would report to Parliament and whose decisions would be outside the jurisdiction of the courts (cl 14).

before Parliament, is thought likely to infringe a 'fundamental right' contained in the Bill of Rights, the matter might be referred to an independent body of which a judge may well be a member. The adverse report of such a body, even though not binding, could have effect. For it would cast on the legislature the onus of justifying the measure which, if implemented, could impair its prestige and popularity at home and abroad.

SUPRA-NATIONAL CONTROL

There is no external body yet in existence which can prevent the abuse of municipal power over individuals. Two developments, which are steps in that direction, are the European Court on Human Rights and the European Economic Community with its own Court. The former is indeed concerned with the individual, but it is not as significant as the latter which, though confined to economic matters, could be regarded as limiting the legislative competence of member states. If there were to be a Human Rights Treaty with machinery analogous to the relevant aspects of the Treaty of Rome, this would provide a check on power transcending national legislatures[14]. For this reason, and also because of its impact on the doctrine of parliamentary sovereignty, the implications of membership of the European Economic Community need attention.

Community law is *sui generis*, not susceptible to classification either as international or federal law[15]. Both the European Court of Justice and municipal courts have regarded it as a new kind of legal order[16]. Certain aspects of Community law have direct internal effect, ie certain measures have automatic law-quality within the member states. Community law consists of the following:

(1) **Regulations,** which are general legislative measures binding on states as well as individuals if applicable (art 189(2) of the Treaty of Rome)[17].

(2) **Directives,** general or particular, bind only as regards their objectives but leave to member states the manner of their implementation (art 189 (3)). Members are required to take all appropriate steps to ensure fulfilment of the Treaty obligations (art 5)[18].

14 See Lauterpacht *International Law and Human Rights* and his prophecy as to a limitation of parliamentary sovereignty at p 141.

15 *Mirabile quidam monstrum:* Lipstein *The Law of the European Economic Community* p 45.

16 Case 26/62 *Van Gend en Loos v Nederlandse Belastingadministratie* [1963] CMLR 105 at 129; Case 6/64 *Costa v Ente Nazionale per L'Energia Elettrica (ENEL)* [1964] CMLR 425 at 455; Case 28/67 *Molkerei-Zentrale Westfalen-Lippe GmbH v Hauptzollamt Paderborn* [1968] CMLR 187 at 217, [1969] CMLR 300.

17 Case 13/68 *Salgoil SpA v Foreign Trade Ministry of the Italian Republic* [1969] CMLR 181; Case 2-3/69 *Sociaal Fonds voor de Diamantarbeiders, Antwerp v SA Ch Brachfield & Sons and Dougal Diamond Co Antwerp* [1969] CMLR 335; *SAFA v Amministrazione delle Finanze* [1973] CMLR 152; Case 82/72 *Re Frauds on Agricultural Levies* [1974] CMLR 251.

18 See art 169, 170; Case 41/74 *Van Duyn v Home Office (No 2)* [1975] Ch 358, [1975] 3 All ER 190, [1975] 1 CMLR 1; on which see Simmonds '*Van Duyn v Home Office*: the Direct Effect of Directives' (1975) 24 ICLQ 419. Directive 221/64 prohibited the deportation of alien citizens of Member States as a deterrent to other aliens. In *Re Deportation of Aliens* [1977] 2 CMLR 255, the German Bundesverwaltungsgericht held that a ruling on Community law given by the European Court took precedence over a contrary ruling by a national court. Lord Denning MR also spoke of 'giving supremacy to Community': *Shields v E Coomes (Holdings) Ltd* [1979] 1 All ER 456 at 465, [1978] 1 WLR 1408 at 1419.

(3) **Decisions,** which are individual measures, are binding as regards objectives and means (art 189 (4)). In practice the distinction between Directives and the other two is not always clear-cut.

(4) **Recommendations** are advisory and not binding (art 189 (5)).

On Britain's accession to the Community on 1 January 1973, Regulations and Decisions, which under the Treaty have automatic law-quality within member states, were given like effect in Britain by the European Communities Act 1972, s 2 (1)[19]. Directives, which do not *per se* become part of municipal law, have to be embodied in Acts of Parliament, Orders in Council or statutory instruments[20]. Section 2 (2) and (4) of the 1972 Act say that whichever of these organs is used, regard should be paid to the objects of the Community and to its obligations and entitlements. Certain limitations on such enabling legislation are specified in Schedule 2, para 1 (1)[1], but these apply to Orders in Council and statutory instruments, not to statutes.

When considering whether membership to the Community limits the sovereignty of Parliament it is important to distinguish between two aspects of sovereignty: between power to pass a measure which has law-quality, and power to repeal or invalidate some other measure which has law-quality. The conferment of domestic law-quality on Community Regulations and Decisions and the question whether these can invalidate contrary domestic laws are thus distinct. It is a British constitutional axiom that no treaty can have internal effect without an enabling Act; and Community law has become 'English law' by statutory fiat. Because of this there is no difficulty in accepting that Community law existing on the date of incorporation can repeal or amend prior municipal law[2]. Since Britain has no written constitution, no question of conflict between Community law and pre-existing constitutional provisions arises[3].

The 1972 Act has given effect not only to existing, but also to future Community law. Even so, there is nothing to impair the supremacy of Parliament and, indeed, the Command Paper issued in anticipation of entry took the view that future Community instruments, 'like ordinary delegated legislation, would derive their force under the law of the United Kingdom from an original enactment passed by Parliament'[4]. Questions of invalidation

19 *Application des Gaz SA v Falks Veritas Ltd* [1974] Ch 381, [1974] 3 All ER 51.

20 It has been held that a provision of the Finance Act 1972, a pre-accession statute in conflict with a prior Community Directive, remained binding on British courts until another statute was passed under s 2(2) of the European Communities Act 1972: EC Commission Decision 73/4 (*Processed Vegetable Growers Association Ltd v Customs and Excise Comrs* [1974] 1 CMLR 113).

1 Legislation imposing taxation, retrospective provisions, new criminal offences punishable with imprisonment for more than two years or fines of more than £400 or £5 per day, or conferment of any power to legislate by means of orders, rules, regulations or other subordinate instruments other than rules of procedure for any court or tribunal.

2 *Re Import of Pork* [1966] CMLR 491 (Germany); *Grundig Werke GmbH and J NJ Sieverding NV v PVBA Common Market Import and Trade Co* [1968] CMLR 97 (Belgium); *Macarthy's Ltd v Smith* [1981] QB 180, [1981] 1 All ER 111; Case 43/75 *Defrenne v SA Belge de Navigation Aérienne* [1976] ECR 455, [1976] 2 CMLR 98, [1981] 1 All ER 122n.

3 For the problems that have beset Germany and Italy, see *Lipstein* pp 22-27, and *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540; *Administration des Douanes v Société Cafés Jacques Vabre and J Weigel et Cie Sarl* [1975] 2 CMLR 336.

4 *Legislative and Constitutional Implications of United Kingdom Membership of the European Economic Communities* 1967 (Cmnd 3301) paras 22-23; *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.

could arise in two ways: (a) a future Community instrument may conflict with pre-existing statute law, or (b) a future statute may run counter to Community law. With regard to (a), the avoidance of existing statute law by a future Community instrument need raise no problem if the latter's authority has been delegated from Parliament[5]. With regard to (b), however, there is difficulty. The Command Paper evaded it by suggesting simply that Parliament will have to take care to avoid conflict, or, if this did occur, will have to pass the necessary amendment or repeal. A problem could confront a court before Parliament has had time to act. What is likely to happen is that an unsuspected inconsistency will come to light for the first time before a court. Perhaps, a distinction should be drawn between implied and express contravention of Community law. Even with regard to the former, Lord Denning MR has said that such a contravention would be valid in English law[6]. Parliament could of course disable itself in advance from contravening Community law impliedly by inserting into every statute a clause 'and in accordance with European Community law'.

As to express contravention, it is by no means inconceivable that an anti-Community government may deliberately go against Community laws. The possibility of conflict is then real. The alternatives are: on the one hand, British courts may take the view that an Act of Parliament expressly contravening Community law remains valid in British municipal law and leaves Britain answerable to the Community. On the other hand, Community law may be regarded as akin to supra-national law so as to disable Parliament from going against it.

The answer is not easy. The evolution of Community law suggests that the issue wears a dual aspect. From the point of view of the Community, the European Court and some municipal courts have accepted the 'priority' of Community law and have even talked in terms of a partial surrender of sovereignty by member states[7]. Moreover, the European Court has pointed out that the Treaty demands the supremacy of Community law over domestic law and that art 189 (2) would be pointless otherwise. Such a view, especially when garnished in the language of surrender of sovereignty, could mean that subsequent contrary municipal legislation is void[8]. In Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (No 2)*[9] the European Court ruled that directly applicable Community law automatically invalidates prior conflicting national law; prevents validity of future conflicting national law; and that every national court must set aside conflicting national measures. This places municipal courts in an unenviable position. From the point of view of municipal law the simple solution would be that Community law has domestic validity by virtue of a municipal statute, and that, therefore, on the principle *lex posterior derogat legi priori* a later statute

5 The Dutch Tariefcommissie held that EEC regulations override national law: *Re Import Duties on Processed Beef* [1966] CMLR 346.

6 *Felixstowe Dock and Rly Co and European Ferries Ltd v British Transport Docks Board* [1976] 2 CMLR 655 at 664.

7 Case 26/62 *Van Gend en Loos v Nederlandse Belastingadministratie* [1963] CMLR 105 at 129; Case 6/64 *Costa v Ente Nazionale per L'Energia Elettrica (ENEL)* [1964] CMLR 425 at 455; *Alma SpA v The High Authority* [1965] CMLR 290 (Italian); *FA Max Neumann v Hauptzollamt Hof/Saale* [1969] CMLR 284; *Molkerei-Zentrale Westfalen-Lippe GmbH v Hauptzollamt Paderborn* [1969] CMLR 300 (Germany).

8 Cf Case 57/65 *Firma Alfons Lütticke GmbH v Hauptzollamt Sarrelouis* [1971] CMLR 674; *Re Fees for Examination of Imported Oranges* [1975] 2 CMLR 415.

9 [1978] ECR 629, [1978] 3 CMLR 263.

overrides prior Community law[10]. On the other hand, a municipal court must also pay heed to the opinion of the European Court, which means that this simple solution is only to be adopted, if at all, in the last resort[11].

As far as Britain is concerned s 2 (4) of the 1972 Act does not, indeed cannot, declare that future Acts inconsistent with the Treaty shall be void. What it says is that 'any enactment passed or to be passed ... shall be construed and have effect subject to the foregoing provisions of this section' (ie the objects of the Community and its obligations and entitlements and Schedule 2 of the Act itself). This puts the burden on the courts, which will no doubt construe an Act so as to avoid conflict as far as possible. If this is not possible, the unavoidable question is whether they can declare it void, or even hold it to be inapplicable to the extent of conflict. If the inconsistency was not intended by Parliament, it is submitted that the latter course is more likely, for courts will hardly assume so revolutionary a power as to declare statutes void. If, however, Parliament were to go deliberately against a Community law while continuing to remain in the Community (ie without repealing the 1972 Act), it is tempting to say that the courts in accordance with age-old tradition will follow Parliament. Yet, as long as membership lasts, the courts are also under certain obligations deriving from that fact, and it remains to be seen whether they will adopt the bold course of holding such a statute inapplicable. If so, it would appear that here at least there is a possibility of a limitation on parliamentary sovereign power.

This leads to the related problem whether Parliament can withdraw from the Community by repealing the 1972 Act. The Treaty itself is indefinite in duration (art 240), which means presumably that on the ordinary principles of international law it will end by unanimous consent or fundamentally changed conditions (*rebus sic stantibus*). As to the validity of unilateral resignation by Britain[12], the crucial question for a British court will be: does the

10 *Syndicat Général de Fabricants de Semoules de France* [1970] CMLR 395; *Felixstowe Dock and Rly Co and European Ferries Ltd v British Transport Docks Board* [1976] 2 CMLR 655 at 664; *contra Administration des Contributions Indirectes et Comité Interprofessional des Vins Doux Naturels v Ramel* [1971] CMLR 315 (France); *Fromagerie* case [1970] CMLR 219 (Belgium); 2695/70 *Amministrazione delle Finanze dello Stato v SACE SpA* [1975] 2 CMLR 267 (Italy); Netherlands Constitution, art 66.

11 Thus, the Italian Constitutional Court in Case 6/64 *Costa v ENEL* [1964] CMLR 425, at 456, upheld subsequent municipal legislation contrary to Community law. Cf the opinion in [1968] CMLR 267. In *Macarthys Ltd v Smith* [1979] 3 All ER 325, [1979] 1 WLR 1189, it was said that the Treaty of Rome could not contradict the clear wording of the Act of Parliament, especially as the Treaty provision was ambiguous. The Court of Appeal stayed proceedings until a reference to the European Court had been made under art 177, as to which see further Case 129/79 [1981] QB 180, [1981] 1 All ER 111.

12 The position under s 4 of the Statute of Westminster 1931 is not analogous. (1) As has been pointed out, it is arguable, even from the British point of view, that the Statute imposes a special manner and form of legislation by Parliament for Dominions so that a statute not conforming to this procedure would be void. Membership of the Community imposes no special manner and form for passing British Acts so that the procedural bar, which might hinder the repeal of the Statute of Westminster, does not stand in the way of the repeal of the 1972 Act. (2) Whereas the Statute of Westminster freed Dominion subjects from Parliament's unilateral power to legislate for them, the 1972 Act in no way frees British subjects from Parliament's power, but only grants a limited, concurrent legislative power to the Community authorities. (3) Even if Parliament were to repeal the Statute of Westminster unilaterally, she is powerless to coerce Dominion subjects into accepting the change, but she can coerce British subjects into accepting a unilateral repeal of the 1972 Act; and even if British courts were to accept as valid the unilateral repeal of the Statute of Westminster, despite the unenforceability of such a measure, it would be quite another thing for them to say that the enforceable repeal of the 1972 Act is invalid.

Community's power derive solely from the 1972 Act, or does it have independent validity once it has been let in by the Act? There are arguments and persuasive authority both ways, and a court will have to pronounce when the point arises[13]. Only if it were to be accepted that Parliament cannot repeal the 1972 Act, or legislate contrary to Community law, would the doctrine of parliamentary sovereignty as hitherto understood have to be revised. Otherwise it remains unimpaired except, possibly, in the minor respect suggested above. Indicative of a future possibility is the attitude of the left wing of the Labour Party and trade union movement, which have been increasingly defying the authority of Parliament by disobeying statutes, but which at the same time call for Britain's withdrawal from the Community. Withdrawal means that there will not be even the possibility of a supranational restriction on the omnicompetence of Parliament, so that if and when they assume to governmental power, nothing can stand in their way in establishing a 'rule by law' if they so wish[14].

In the result it would seem that there are possibilities of restraining power, though less in Britain than in countries with written constitutions. Even with reference to Britain the idea is perhaps not as starry-eyed as it might seem at first sight. All countries have still a long way to go, so this challenge of the age has not yet been met.

13 In *Blackburn v A-G* [1971] 2 All ER 1380 at 1383, [1971] 1 WLR 1037 at 1040, the Court of Appeal declined to anticipate the answer. Lords Diplock and Scarman have since said that British courts should follow Parliament.

14 On this see Dias, '*Götterdämmerung*: Gods of the Law in Decline', (1981), Legal Studies 1 at p 21.

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CHAPTER 6

Control of liberty

Abuse of liberty is not the path to freedom or justice. In the case of liberty, as with power, the achievement of justice lies, not in equal distribution, but in disallowing certain liberties altogether and in restraining the exercise of those that are allowed[1]. The crucial point is the criterion by which it has to be decided that a particular liberty should or should not be allowed, or that its exercise is in need of restraint. 'Control of liberty' is an apparent contradiction in terms, since to abolish a liberty by replacing it with a jurally opposite duty is to restrict the overall area of freedom. Control by such curtailment will be referred to as 'limitation of liberty'. Where, on the other hand, liberty is allowed to remain, the problem of control concerns how its exercise might be restrained; and this aspect will be distinguished from the former by the expression 'restraint of liberty'.

With regard to limitation, it is clear that liberty ends where duty begins, and *vice versa*. Although the phrases 'liberty to do something' and 'absence of duty not to do it' denote the same result, their connotations are different. A régime, which forbids everything save only those things that are expressly allowed, would be regarded as a bullying power-structure, while a régime, which permits everything save only those things that are expressly forbidden, would be counted liberal by contrast. Yet, in content they may be identical.

LIMITATION OF LIBERTY

Duty not to exercise power

As pointed out earlier, duties cannot be imposed on sovereign legislatures not to exercise their power to make laws. The most that can be hoped for in this direction is to restrict the power itself by attaching disabilities, the possibilities of which were explored in the last chapter. Sovereign legislatures can of course impose duties on their subjects not to exercise certain liberties, whether by way of exercising powers or in any other way.

With regard to the limitation of liberty, it is superficially attractive to contend that there should be equal liberty all round, or that it should be curtailed equally. The matter is not so simple, however; whether minorities or individuals are allowed certain liberties at all depends, not on equality, but on the priority of values. Suppose that a government has been established by rebels. They will find it difficult to accord liberties to anyone else to express opposition[2]. For, if they believe in their own cause and the values

1 The Conservative Party Political Centre document *Public Order* (1970) speaks of 'a synthesis of freedom and order. It is a notoriously difficult task, but it is necessary to try to achieve it as the basis for a satisfactory system of law in a democratic society'.

2 This is so whether it is a right-winged rebellion against a left-wing régime, eg Franco's rebellion against the previous communist government, or *vice versa*.

which they espouse, they clearly cannot allow others to act on values against which they rebelled and which could imperil their hard-won position by inspiring the same sort of agitation by which they themselves weakened and eventually overthrew the previous régime. From their point of view, such agitation will be an abuse of liberty, which cannot be allowed. The result is usually two-fold: the imposition of a severe discipline consisting of sundry prohibitions and the intensive use of propaganda vilifying other points of view as 'counter-revolutionary', 'fascist', 'communist' etc, so as to justify repression. In this way a worse power-structure than that which it replaces comes into being; but the point is that the limiting of liberties, which all this entails, reflects the priority accorded to the values of those in power. Should governments have liberty to destroy liberty by the exercise of such power? If it is thought not, then the possibilities will have to be explored of imposing disabilities on them, as considered earlier. If these prove to be of no avail, it is difficult to see how any curbs can be imposed on governmental liberties to use power other than the moral self-restraint of the individuals composing government.

Apart from government there are other kinds of liberties to exercise powers. Courts may sometimes protect individuals against the abuse of power by the executive[3]; but certain other liberties to abuse power can only be dealt with by government. A Conservative Prime Minister once spoke of the 'unacceptable faces of capitalism', such as profiteering and monopolies. Employers used to be at liberty to drive unconscionable bargains with workers, and trade unions evolved to redress the unequal bargaining position. That is now a thing of the past. Here and there some abuses have been dealt with, eg by monopoly legislation, anti-trust laws etc, but others remain, as where building speculators and landlords have contributed to the land and house price problem; and so forth. Workers, who are asked to hold back on wage demands, have indeed cause for complaint when such people as these are left free to pick their way around and betwixt the law and to misuse the liberties allowed to them. These are not cases of allowing everyone equal opportunity to exercise them; the question is whether such liberties should be allowed at all. The competing values here are those of individual liberty of action and the social interest, and it is submitted that in these kinds of situations the latter should prevail. There are also 'faces of socialism' which many would regard as equally unacceptable, eg the 'closed shop' principle, which reflects a conflict between the value of individual liberty to join or not join a trade union and the collective interest of workers in a trade[4]. Again, there is the liberty to strike to the detriment of the national economy or sections of the public, which is a conflict between other values writ large.

Liberty and anarchy

At the opposite end to dictatorship is the permissive society, which allows liberties to the point where society becomes fragmented. Slogans such as 'liberality', 'tolerance', 'reasonableness', are so emotively charged that many

3 *Congreve v Home Office* [1976] QB 629, [1976] 1 All ER 697; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, [1976] 3 All ER 665; *Laker Airways Ltd v Department of Trade* [1977] QB 643, [1977] 2 All ER 182.

4 See the decision of the European Court of Human Rights against the British Government: *Young, James and Webster v United Kingdom* [1981] IRLR 408.

might be termed the 'institutional' and the 'utilitarian' interpretions of 'moral position'.

The 'institutional' basis

In a lecture to the British Academy a distinguished judge, Lord Devlin, criticised the Report of the Wolfenden Committee, which had advocated lifting the ban of the criminal law from homosexuality between consenting adults[11]. He maintained that the law should continue to support a minimum morality. In the light of the widespread controversy which the lecture aroused, his position may be outlined as follows. An important point, which has subsequently been clarified, is that his case rests on the fact that each society has evolved certain moral institutions which form part of its own particular fabric. Marriage, for intance, is an institution of societies generally; but monogamy is not essential to every kind of society though it is to Christian societies, and is thus a part of their particular fabric. Just as most institutions of a society are interrelated and interdependent, so also is its particular morality; one cannot pluck one strand without puckering the whole. It has been suggested, rightly it is submitted, that Lord Devlin's case is best understood on the basis of moral intitutions which are necessary to the existence of particular societies[12].

In so far, then, as some moral ideas are part of the fabric of a given society, that society is entitled to preserve them, and thus itself, against anything capable of destroying them; which is why Lord Devlin compares contravention of this morality to treason. The law cannot undertake not to interfere[13]. For such moral institutions are like the legs of a chair; if one is pulled out, the chair may not necessarily topple over, but it will be more prone to do so. He does *not* seek to preserve moral ideas against change, as some critics have alleged; what he urges is that responsible persons should be slow to change laws protecting them.

In order to preserve itself society is entitled to use its laws when the limit of tolerance is reached. This is gauged with reference to the reasonable man, a juryman. What should count are opinions reached after informed and educated discussion of all relevant points of view (not excluding religious or any other). When opinion is divided, the majority view should prevail, as it does in the ordinary legislative process on even the weightiest matters. The following are the limits within which legislators should act. (a) There should be the maximum of freedom consistent with the integrity of society. (b) The limit of tolerance is reached when the ordinary man would feel indignation and disgust. (c) Law-makers should be slow to change. (d) Privacy should be respected as far as possible. (e) Laws should be concerned with minimum, not maximum, standards.

Lord Devlin has been attacked and defended. One objection is that his thesis involves practical difficulties which are difficult to overcome. The

11 Devlin 'The Enforcement of Morals' *Maccabaean Lecture in Jurisprudence* 1959, reprinted in *The Enforcement of Morals* ch 1. In the Introduction Lord Devlin considers some criticisms of his thesis. See also the later chapters.

12 *Mitchell* p 25.

13 Rostow 'The Enforcement of Morals' [1960] CLJ at 191, cites two cases, *Reynolds v US* 98 US 145 (1878) and *Musser v Utah* 333 US 95 (1948), where the Supreme Court upheld laws against polygamy notwithstanding the provision in the Constitution that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'.

reasonable man test is too vague to apply in a given case; and so is the criterion of indignation and disgust. The workings of a juryman's mind are not entirely reassuring, while the influences that work on it in a court of law are different from those that operate outside, eg on moral issues. Also, an inevitable tendency of his thesis is that it lends itself to upholding intitutions as such without regard to those very considerations and points of view which he said should be taken into account.

The 'utilitarian' basis

Lord Devlin's principal opponent, Profesor Hart, proceeds from John Stuart Mill's utilitarianism[14]. He admits that '*some* shared morality is essential to the existence of any society[15], but the significance of this is that it connotes morality which is the *sine qua non* of the existence of any and every kind of society, not just of a particular society. Mill's thesis, adopted by the Wolfenden Committee and Professor Hart, was as follows. Strong monarchs were needed in the past to repel aggressors and to maintain order. Because power tends to be abused, they developed into tyrants; so democracy was resorted to. However, the idea that democratic government cannot be tyrannical is false, since tyranny can be exercised in ways other than by law, namely by the morality of a ruling class. 'Wherever there is an ascendant class, a large portion of the morality of the country emanates from its class interests, and its feelings of class superiority[16]. Accordingly, his plea for liberation was that laws should not uphold morality of such, but should only seek to prevent harm to others as this is disruptive of any kind of society.

As to this, it is obvious in the first place that Mill's position conceals a moral premise, namely that it is morally wrong to uphold morality as such[17]. Next, there is difficulty over the idea of 'harm to others' which includes many things. No one doubts that it covers physical hurt, but the legal prohibition of 'harm' on a broader scale is in fact acceptable even to utilitarians. Professor Hart justifies this wider interference on grounds of 'paternalism', ie the concern of the law to prevent people from harming themselves. This enables him to support the continued prohibition of certain kinds of harm even when the victim has consented[18]. An extension of the idea is seen in the question: Should a man be free to make himself unfree? Mill was quite clear that the answer is: No. 'The principle of freedom', he said, 'cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom'[19]. Again, Professor Hart supports the continued prohibition of homosexuality with youths by using the argument of paternalistic concern to protect them from corruption. He is here hoist with his own petard, for the very word 'corruption' implies a moral position. His concern is for the moral welfare of youth, so he is using the law to uphold morality as such after all[20]. He also resorts to paternalism in order to justify

14 *On Liberty*, in Mill *Utilitarianism, Liberty and Representative Government* (ed Lindsay) p 65.
15 *Hart* p 51.
16 *Mill* p 70.
17 Cf *Hart* p 17.
18 Eg the rule that consent is no defence to a criminal charge of inflicting grievous bodily harm (*R v Donovan* [1934] 2 KB 498), or to breach of statutory duty (apart from the limited exception recognised by *ICI Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999).
19 *Mill* p 158.
20 For this and the following objections, see *Mitchell* ch 4.

the prohibition of acts which are 'offensive' to the public. Thus, it is not immoral for a husband and wife to have intercourse with each other, but it would be offensive for them to do so in public, which is why such public behaviour is rightly forbidden. Accordingly, he subscribes to the distinction drawn by the Wolfenden Committee between 'public' and 'private' behaviour, between public and private spheres of morality. The latter is not the concern of law.

There are objections to this. In the first place, public offensiveness and the immorality of conduct cannot always be separated. Thus, accosting in public is not offensive if done by a girl collecting for, say, a university rag; but it would be if done for purposes of prostitution. What makes the latter offensive is the knowledge of her immoral purpose. Nor is it possible to demarcate public from private behaviour, for what a person does in private can have repercussions outside because society is made up of a net-work of moral institutions. Because of the difficulty of marking out the boundaries of the influence of so-called 'private' actions, it is not possible to exclude these *a priori* as having no bearing on the problem. Nor can one meaningfully draw lines of demarcation between 'private' and 'public' spheres of morality, because the same action can have private or public significance depending, eg on the individual involved. Thus, a factory hand, who has an illegitimate baby, does not impinge upon the populace as does a public figure whose similar behaviour is more likely to be invoked as an example. This interrelation cuts across the public-private division, which is, therefore, unhelpful in deciding whether or not law should uphold a moral institution. Another difficulty arises out of Professor Hart's explanation of the prohibition of bigamy as analogous to public nuisance in that it is not only an affront to a public ceremony, but also throws the legal obligations of parties into confusion. Here he seems to be underlining Lord Devlin's point that both the affront and confusion stem from the fact that monogamy is the accepted institution and part of the fabric of *this* society[1].

As Lord Devlin himself has pointed out[2], if the law is entitled to show a paternalistic interest in the matters which Professor Hart specifies, why should it not show paternalistic zeal in maintaining the morals of a community? It seems curiously contradictory if people insist, as they do, that the state nowadays should assume responsibility by means of laws for education, health, trade etc, and at the same time deny it responsibility for morals. The survival of a country in a crisis depends on the resilience of its people, and moral discipline is as necessary to such strength as physical discipline is to an athlete. Self-indulgence weakens the character of individuals and ultimately of the state; which is contrary to the interests of the state. In this connection it may be noted that Professor Lloyd, supporting Professor Hart, says that 'the other side of the coin is *moral pluralism*. Would this lead to antagonism, to a society in the state of nature depicted by Hobbes, or rather to mutual tolerance, to co-existence of divergent moralities? What evidence there is comes down firmly in favour of co-existence'[3]. He gives no indication of what this evidence is, nor how there could be evidence while a situation is in flux. People on the edge of a landslide may truly say that at that precise moment collapse has not occurred. What needs to be stressed against this kind of view

1 *Mitchell* p 28.
2 *Devlin* ch 7.
3 Lloyd *Introduction to Jurisprudence* p 52.

is that there is a point at which fragmentation of values destroys cohesion, and co-existence becomes unworkable. As long as that point has not been reached people can talk about co-existence, but once divergent groups agree to differ in important respects, the very importance of these and the insistence on maintaining the respective points of view will create gulfs, which will become increasingly unbridgeable as time goes on and will lead eventually to the groups having less and less in common. The Russians perceive this very clearly. Their apparatus of secret police, exclusive propaganda and the like are designed to prevent any fragmentation of the socialist morality. They portray an extreme,which no advocate of moral pluralism could recommend. What these advocates do not appear to face is that at the other extreme moral pluralism itself will eventually cease to be, for 'pluralism', 'co-existence' and 'tolerance' presuppose that underneath the divergences there still remains some unity without which 'co-existence' and 'toleration' have no meaning. The question is whether it is possible to preserve that underlying unity simply by drawing the line of legal interference at 'harm to others'. For the reasons given, this seems inadequate.

Finally, the moral standards of a community influence the handing on of a way of life, which means that a state's concern with education cannot stop short of this point. Ideals are part of laws when these are viewed in the context of social life, and they enter into the broadest concept of 'harm to others'.

Both sides agree that laws should uphold some moral positions, though they advance different reasons. The dispute touches on the limits which should be set on their use. According to utilitarians, they should only uphold that aspect of morality which is a *sine qua non* of any type of society, whereas according to Lord Devlin they should be concerned with all the morality that constitutes the *sine qua non* of the particular society[4]. Apart from this, the utilitarians only mask, and fail to expel morality from consideration, while Lord Devlin fails to provide a workable test as to where legal reinforcement should stop.

Much of the argumentation in this debate illustrates what was said at the beginning of the book about persuasion[5]. Appeal to 'evidence' is misplaced. For intance, Professor Hart's assertion that '*some* shared morality is essential to the existence of any society' cannot be 'proved' or 'disproved' by 'evidence'. Further, morality is an area in which people hold strong views so that arguments, however persuasive, are not enough in themselves to prise them out of fixed positions; which is why this particular debate is destined to remain inconclusive. It certainly cannot be resolved by applying a single formula, like 'harm to others', or any other. In addition to what has already been discussed, it seems necessary to take account also of the type of legal machinery that might be used.

Machinery of the law

Granting that laws should uphold morality, at least to some extent, something has now to be said about the word 'uphold'. The two concepts that may be invoked are disability and duty.

4 *Mitchell* ch 2, especially at p 25. For a different analysis, see Samek 'The Enforcement of Morals: A Basic Re-examiniation in its Historical Setting' (1971) 49 Can BR 188; also Lord MacDermott *Protection from Power under English Law* pp 8, 195.

5 See p 14 ante.

DISABILITY. Abolishing the duty not to indulge, eg in homosexuality, does not affect its immoral quality, just as adultery remains immoral though it is no longer an offence in this country. The moral attitude might still be 'upheld' by rules attaching disabilities with regard to immoral conduct. Thus, contracts to commit homosexuality could continue to be void, and ground no collateral claims for unfair dismissal[6]; and there may still be disability to sue *ex turpi causa*. The law may go further and 'uphold' the moral attitude in other collateral ways, eg by punishing advertisement of homosexuality as a conspiracy to corrupt[7], and by treating an allegation of homosexuality as an imputation against character[8].

DUTY. Direct prohibition of immoral conduct by means of duty is more troublesome. Its functioning should be taken into account along with other considerations. The following factors would seem to be relevant. (i) The danger of the activity to others; (ii) the danger to the actor himself; (iii) economy of forces needed for detection and pursuit; (iv) equality of treatment; (v) the nature of the sanction; (vi) possible hardship caused by the sanction; and (vii) possible side-effects. It is submitted that the question whether or not laws should be used to uphold morality through direct prohibition is better dealt with on the basis of a calculus such as this rather than on some simple formula like 'harm to others'.

The machinery of the civil law is inappropriate for two reasons. Its remedy is usually compensation, but this is owing only to unwilling victims and is thus inapplicable to cases of consent or of immorality with animals. Besides, compensation may easily develop into a trade in vice. The machinery of the criminal law has the advantage that it is already geared to giving effect to the interests of the state, but it also has disadvantages. One is that punishment is not the cure. When meted out as revenge, it presupposes a victim, and there is no victim when he has consented. Its deterrent effect depends on the likelihood of being caught. If this is small, as is usually the case with sexual misconduct, the deterrent influence is small too. Again, punishment can have deleterious effects, for sexual immorality stems from deep-seated drives which need channelling, not punishment. One strives to cure disease, not to punish sufferers. Finally, the words 'crime' and 'criminal' are emotively charged. People who object to the epithet 'criminal' might not object to 'treatment', or some equivalent. Ideally what is required is some machinery that will give effect to the interests of the state in upholding moral institutions without the stigma of 'criminal' attaching to it and which will provide curative treatment. Something along the lines of juvenile courts, where reference to 'criminality' is avoided, seems to be indicated.

RESTRAINT OF LIBERTY

Restraint of liberty is a more deep-seated problem than power. In the first place, liberty stands behind the very exercise of power. Whatever kind of

6 *Coral Leisure Group v Barnett* [1981] ICR 503.

7 *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898. Approaches for homosexual purposes between adults are approaches for 'immoral purposes' within s 32 of the Sexual Offences Act 1956: *R v Ford* [1978] 1 All ER 1129, [1977] 1 WLR 1083.

8 *R v Bishop* [1975] QB 274, [1974] 2 All ER 1206.

power one has, there is usually a liberty to exercise it or not[9]. The danger of abuse has to be met by abolishing the power and replacing it with a disability, which was considered in the last chapter; or by abolishing the liberty and replacing it with an externally imposed duty not to exercise that power; or through voluntary restraint in its exercise. Secondly, at the other end of the scale and removed from oppression is permissiveness, which gives free rein to liberties of action. The giving of equal liberties could reach the point of anarchy and the question then is how liberties, which are destructive if exercised abusively, are to be restrained. Finally, even where the law limits liberty by replacing it with a duty not to do some act so that the individual no longer has any liberty *at law*, he still has an inner *moral liberty* to obey the law or to disobey. Law here reaches its limit. For restraint on liberty beyond this point can only derive from self-restraint and self-discipline, and all that law can ever hope to do so is to help in indirect ways to promote the necessary moral sense of obligation. It is for these reasons that the problem of liberty cuts far deeper than that of power.

Forces of moderation appear to be in retreat at the present time and a sense of obligation is at low ebb. Strikers, for intance, seek to cast on government, or other body against which they act, the responsibility for their own calculated exercise of liberty to hit the public, arguing that they have been driven to such action. The justice of their cause is not the point; it is the justice of the means adopted[10]. Is liberty to hit the innocent a just way of furthering a cause? When the point of moral liberty is reached, any restraining influence on it must spring from inner motivations, whether through fear of punishment or through a sense of obligation, which in turn is bound up with the extent to which people are prepared to accept standards and have a sense of purpose and faith in a way of life. The law is directly involved in the imposition and enforcement of punishment, but with regard to promoting the acceptance of standards and faith in a way of life it can only play an indirect part at most.

Within limits the courts can sometimes restrain governmental exercises of liberty. If reasons are given for a certain action, they can inquire into their adequacy; if none are given, they are powerless. More important is their use of 'unreasonableness' as a check on the exercise of executive discretion the details of which must be sought in books on administrative law[11].

With regard to individual liberties of action, the inhibition of the liberty to disobey through fear of punishment has been touched on[12]. Leaving that aside, the abandonment of standards might also be discouraged to some extent, as pointed out above, by attaching disabilities to certain activities. Neither of these methods promotes a sense of obligation; they do no more

9 For power coupled with a duty to exercise it or not to exercise it, see pp 36–38 ante.

10 Most kidnappers and hi-jackers, who kill, or threaten to kill, innocent victims, are also convinced of the justice of their cause and they, too, seek to cast responsibility for what they do away from themselves.

11 See, eg *Roberts v Hopwood* [1925] AC 578, *Laker Airways Ltd v Department of Trade* [1977] QB 643. Cf *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014, [1976] 3 All ER 665. In *Asher v Secretary of State for the Environment* [1974] Ch 208, [1974] 1 All ER 156, a Minister exercised his discretion to uphold the law and the court supported him. Cf *Gouriet v Union of Post Office Workers* [1978] AC 435, [1977] 3 All ER 70, where the court upheld the Attorney General's discretion to refuse to uphold the law, which seems wrong, since it was upholding the latter's use of law as an instrument of government policy, ie 'rule by law'.

12 See p 51 ante. See also pp 313 et seq. post.

people become obsessed with being thought 'illiberal', 'intolerant', or 'unreasonable', which colours their approach. Also, people react justifiably against abuses of power, of which there are numerous examples, but in stepping backwards from that danger they fail to pay heed to the abyss of anarchy at their heels. To condemn an abuse of power is obviously not a denial of all exercises of power. Some exercise of it there must be to avoid chaos. If everyone insisted on complete liberty of action in using the highway, traffic would seize up; so certain limitations on liberty are imposed in the interests of all. Likewise, limitations have to be imposed on various other kinds of liberties in order to hold society together. Obviously there should be no liberty to murder, maim, steal etc, but these are extreme examples. The question is always one of the degree of latitude that should be given to the free expression of divergent views and actions.

Law and morality

Toleration of a minority implies a majority that does the tolerating; but there could come a point when so many minorities are in being that there is no majority left. Democracy itself can only work so long as the differences between groups do not impair a broad substrate of shared values. Once this disintegrates the groups will tend to become increasingly alienated from each other, and democratic government could not possibly work any more. If society does fragment in this way, distributive justice in that society ends with it, and the problem becomes one of co-existence between groups and justice between them will pose new problems to be worked out afresh. Permissive societies are always in danger of becoming weak societies unless a stand is taken at some point to uphold a broad basis of cohesive values. One of the most important cohesive factors is the shared morality of a society, and the extent to which efforts should be made to uphold a minimum morality has become the subject of dispute.

One question is whether certain moral liberties should be allowed at all, ie how far prohibitory laws should be used to uphold moral positions. First, what is the significance of the word 'should'? No one denies that many laws do reflect moral considerations[5], while many are morally neutral. The question is not whether they do or do not, but whether they should uphold morals, ie the moral justification for using laws in this way[6]. Justification is said to be needed because (i) the imposition and enforcement of legal duties limit liberty of action; any interference with liberty is said to need justification since 'liberty is ancient; it is despotism that is new'. (ii) Much of the legal reinforcement of morals involves interference with sexual freedom; and the psychological problems that can arise through the inhibition of such deep-seated drives demand that sufficient reasons be given. (iii) The freezing of moral attitudes by laws may hinder the processes of moral change; so hindrance needs justification.

Morality has hitherto been largely bound up with religion, and it is said that once a state leaves religion to private judgment it should do likewise with morality. There is, however, a distinction. Moral ideas of right and wrong dictate behaviour, but religion is a matter of belief and only influences behaviour through the moral attitudes which it fosters. Many ideas about

5 Pollock *Essays in the Law* pp 53–79.
6 Hart *Law, Liberty and Morality* pp 4, 28.

everyday morals are not peculiar to any particular religion, or any religion at all. Since the state is very much concerned with the behaviour of its citizens, it may rightly continue to concern itself with moral attitudes while renouncing interest in beliefs, except when these are thought to be conducive to undesirable behaviour, eg Scientology.

Another reason is that social existence depends upon co-ordination, which in turn requires restraint in individual action. As has been pointed out, such restraint may spring from laws imposing duties to limit liberties, or it may spring spontaneously from moral sense. Liberty and duty are jurally opposite, each beginning where the other ends. Accordingly, legal restrictions may only be relaxed safely when there is a sufficient degree of self-control bred from moral discipline[7]. This has hitherto been linked to religion, but today religion is fast losing its former appeal and with this the influence of its moral teaching. To relax legal restraints at a time when there is less and less assurance of self-discipline is the path to social destruction; which is why some reinforcement of moral discipline by law must continue.

The problem confronting law-makers is a difficult one, made worse by the modern tendency of people who, though largely apathetic, bestir themselves to protest, not against indiscipline, but against any insistence on discipline. This may be a reaction against the terrible experiences under Nazi and Fascist and similar contemporary dictatorships, which induces people to associate any sort of discipline with tyranny. A different reason may be the desire of the individual to assert his identity which, it is felt, is in danger of being lost amidst the standardised and machine-like structure of modern society.

Finally, the message which comes through history is that, although emphasis may be laid now on power and now on freedom from it, depending upon the paramount need at any particular time, thinkers of all ages have acknowledged that some restraint through laws on liberty of action is necessary if anarchy is to be avoided[8].

Next comes the interpretation of 'moral position', which is central to the problem of how far laws should uphold morality. Two persons may debate whether the law should allow or forbid the doing of something which both acknowledge to be immoral. What of the man who asks, On what basis is it judged immoral? Answers based on religion cannot appeal to non-believers and so fall outside the scope of this chapter. A secular answer given by Professor Hart is that '*some* shared morality is essential to the existence of any society'[9]. 'Essential' has two aspects. On the one hand, it means that some shared morality is an ingredient of any and every community, ie a part of every community is its morality. On the other hand, it may also connote certain additional moral ideas which have become part of the fabric of a particular society[10]. This distinction provides the respective bases for what

7 Thus, freedom of contract led to exploitation of workers by employers, so legal restrictions had to be imposed. Supporters of *apartheid* in Southern Africa sometimes resort to the argument that to give liberties and powers to Africans, who lack self-discipline not to abuse them, will lead to chaos. This needs to be set against the point that to base legal restrictions on a racial distinction and to give those who benefit from the discrimination the power to decide what amounts to a sufficient degree of self-discipline and how fast Africans should be allowed to acquire it create grave long-term problems.

8 See pp 70-85 ante.

9 *Hart* p 51. He appears to regard this as self-evident. See also Milne 'Bentham's Principle of Utility and Legal Philosophy' in *Bentham and Legal Theory* (ed James) at p 31.

10 See Mitchell *Law, Morality and Religion in a Secular Society* for elaboration.

than indicate the probable consequences when such sense is lacking[13]. Nor is fear the only, or even decisive, factor in securing obedience[14].

A more powerful inducement towards obedience comes from an acceptance of the standards underlying the law[15]. Indeed, resort to legal prohibition of undesirable behaviour may safely be kept to a minimum as long as there is acceptance of moral standards which discourage it, for the self-restraint which these inspire will check any abuse of the liberty allowed at law. The law can only help indirectly in the acceptance of standards by discouraging their abandonment. For instance, where there are laws, especially those embodying the standards of that shared morality, which, according to Professor Hart, is essential to any society, the upholding of such laws not only points to the existence of the standards, but also helps to preserve them by acting as a brake on their abandonment. It is precisely at a time when standards are being questioned that it becomes socially suicidal to relax laws simply because they are being questioned or are difficult to apply. This is not to argue that there should be no change; questioning is only the first wind of this. It is quite another thing to abolish legal restraints at a time when moral restraints are already on the wane since this could end in destroying society, not changing it.

Upholding laws, therefore, helps by preserving a 'moral atmosphere', which is essential to preserving that shared morality, which in turn is essential to encouraging obedience and social existence. It gives heart to those who support standards and wish to conform. *Their* point of view should not be overlooked, for they too deserve to be heard and have been ignored for too long. Laws also set criteria by which non-conformity is acknowledged to be disobedience and illegal even by dissidents. Conformity must remain the norm; it is for non-conformists to justify themselves[16]. This is most important, for to remove a sense of disobedience and illegality by removing the law is to remove a support of the social fabric[17]. Besides, the standards embodied

13 Cf: 'Students who are accorded the coveted privilege of attending an educational institution, founded and maintained from public funds, and who grossly abuse that privilege by resorting to public violence, will be dealt with severely when they come before the courts. The privilege conferred upon them imposes a duty to act in a responsible and mature way and the privilege of attendance does not confer on them the right to interfere in any way in the day-to-day administration of the institution during their brief sojourn there': Macdonald JP in *State v Katsande* 1974 (1) SA 355 at 362. The duty referred to is clearly not the duty not to cause criminal damage, since it would be a *non sequitur* to say that the liberty to attend a university imposes that duty. What is referred to is the moral duty to exercise liberty responsibly.

14 This was pointed out by Bryce *Studies in History and Jurisprudence* II pp 6 et seq. See pp 48 et seq. ante and p 248 post.

15 This is the essential point in Goodhart *English Law and the Moral Law*. Llewellyn *Jurisprudence: Realism in Theory and Practice* ch 18, points out that obedience is a matter of habit and practice; Fried 'Moral Causation' (1963-64) 77 Harv LR 1258, distinguishes moral causation of obedience from psychological causation and moral persuasion.

16 Puner 'Civil Disobedience: an Analysis and Rationale' (1968) 43 NYULR 651 (and see also the other contributions to this issue); Wasserstrom 'The Obligation to Obey' in *Essays in Legal Philosophy* (ed Summers) 274.

17 In the 'Clay Cross' Affair (1974) certain local councillors exercised their private judgment that an Act of Parliament passed by a Conservative government was unjust, and they disobeyed it. The succeeding Labour government not only repealed the Act, but also sought to remove the illegality of their disobedience retrospectively. Such a vindication of the liberty to disobey strikes a damaging blow to the upholding of law. Even more disastrous for law and the authority of Parliament was the refusal by the Attorney General to take action to prevent an organised defiance of an Act of Parliament: *Gouriet v Union of Post Office Workers*

in the law are the criteria by which the outside world judges a country, and no country can now live in isolation or afford to ignore world opinion altogether. The presence of laws is also helpful in persuasion and reform of dissidents and in providing points of reference when weighing up the pros and cons of proposed action[18]. Indeed, upholding laws may even in time shape the *mores* of the community. It has been said with some degree of truth that forcing people not to behave in certain ways does not make them moral; it merely sets up taboos. This is true up to a point, but there is also the countervailing influence that the regular enforcement of law does produce a psychological adjustment towards acceptance of its standards[19]. The law can have an educative function to perform, which could be impaired by failures to uphold laws. Besides, every failure estops the authorities from trying to uphold a law on a subsequent occasion.

A commonly advanced reason for abolishing laws, especially those concerning moral standards, is that these may have become difficult to enforce ie detect and visit with sanctions, which is said to lead to discrimination in punishment in that only some people are punished and not others. This is a fallacious argument, for it confuses discrimination in punishment with catching offenders. Even if many violations of a law go undetected, it is important to deal firmly with cases that are detected. A large number of murders may go undetected, but is that an argument for abolishing the law against murder? Unenforceability is a matter of degree, and difficulty of enforcement, however great, should never be a ground *per se* for abolishing any law[20]. The argument rests on the premise that only enforceable laws should be preserved. But enforceability is less significant in ensuring obedience than the psychological pressure towards conformity exerted by the fact of other people's conformity. Successful disobedience by one person relaxes the pressure to obey by setting an example to someone else to disobey in circumstances in which the first person would still have obeyed, and he is estopped from protesting that the second person has gone further than he would have desired. The more numerous the cases of disobedience, the weaker becomes the pressure. Even so, some residue of pressure always remains by virtue of the fact that *some* persons continue to obey and by virtue of the mere existence of something possessing the quality of 'law', which casts on deviants the onus of justifying themselves. The danger of abolishing a law because it it unenforceable and is being disobeyed is that it weakens at one stroke the pressure to conform even to other enforceable laws; which is how laws once enforceable *become* unenforceable in time. In short, to talk of maintaining only enforceable laws is to take the first step towards undermining *their* enforceability.

Enforceability of a law depends on the observance by the officials concerned of other laws giving effect to the penalty. Once they are discouraged

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[1978] AC 435, [1977] 3 All ER 70, on which see Dias *Götterdämmerung*: Gods of the Law in Decline' (1981) 1 Legal Studies 1.

18 Palley 'Constitutional Devices in Multi-racial and Multi-religious Societies' (1968) 19 NILQ 381 et seq.

19 Olivecrona *Law as Fact* (1939) pp 147-148; Lord Simon in *Charter v Race Relations Board* [1973] AC 868 at 900, [1973] 1 All ER 512 at 527. Plato and Aristotle taught that to rule is to educate; while the Soviet Union is engaged in a gigantic effort to educate the masses for communism. See pp 51-52, and ch 19 post.

20 On the need to enforce laws particularly in this kind of situation, see Dietze *Two Concepts of the Rule of Law* especially ch II.

because of lack of interest in upholding laws, the practical foundation of law-enforcement as a whole is eroded[21].

Another argument is that the support of dissidents may be won back by removing laws against which there is widespread protest; otherwise the disobedience that is likely to ensue might bring all law into disrepute. This, too, is a dangerous argument, particularly when discontent threatens to be general. For in such a climate there has invariably been a prior loss of support for the standards involved independently of the laws reflecting them; criticism of the latter is only the consequence. Support for those same standards used to be forthcoming, often for generations, and in some cases along with more stringent laws than exist presently. If, then, support for the standards has been lost independently of laws, abolition of the latter will not win back or preserve one jot of support even for what is left. Instead, the abolition will simply be accepted as of course and become a basis for demanding the relaxation of yet other standards and laws. It is important to remember that those loyal to standards and laws should not be betrayed. Removal of laws as a concession to dissidents is more likely to bring about the loss of *their* confidence and faith. The easing of laws and penalties on anti-social conduct may conceivably result in less freedom and safety for the law-abiding. As Dietze puts it: 'Just as the despotic variant of democracy all too often has jeopardised human rights, its permissive variant threatens these rights by exposing citizens to the crimes of their fellow-men'[22]. Mere condemnation of such behaviour and words of sympathy with victims are never enough without firm action giving practical effect to such sentiments. The more law-abiding people lose confidence in the law and those in authority to protect them, the more will they be driven to the alternative of taking matters into their own hands, the perils of which are unthinkable and are nearer than some liberally-minded philanthropists seem inclined to allow[1].

Something more positive than just the preservation of a moral atmosphere is needed to foster the acceptance of common standards and moral restraint in liberties of action. A unifying force is required, which can only derive from a sense of common purpose and faith in a way of life. Such a sense of unity becomes manifest in times of national crisis, such as a war; but these are of short duration. To achieve lasting unity a lead has to come from a common moral inspiration and a sense of obligation. It must be a *lead* if it is to inspire people with a sense of social responsibility and induce them to 'pull together'. If morality is regarded simply as a reflex of socieiety, it will only tend towards greater and greater diversification in permissive societies[2]. The irresistible conclusion is that such a lead must come from religion, whatever its form or name. Simply to have faith in a way of life is not enough. This may pull people together and provide inspiration for a time, as national-socialism did in Hitlerite Germany. It has to be a just way of life,

21 Constant criticism by the Labour left of police action to uphold the law during the miners' strike of 1984 induced at least one leading police officer to say that the police might have to reconsider their position when the next Labour government comes into power. His view was repudiated, but the point was made.

22 *Dietze* p 54.

1 Northern Ireland is an example. Cf Green 'Law and Morality in a Changing Society' (1970) UTLJ 422 at 433.

2 A democratic system where elected representatives are only 'mandated mouthpieces' of their particular constituencies can work as long as there is a measure of shared values throughout the entire electorate. Once this ceases to exist, the mandate system b[illegible]

particularly one in which neither power not liberty is abused, if it is to last. In the past it was religion that inculcated moral restraints on action, and as long as religious dictates held sway the law could hold back. Today when so many religions are losing their hold, the need is to re-establish their appeal. The little that law can conceivably do towards this end is to lend its techniques and discipline to a re-examination of established religious ideas, which could make them more acceptable[3]. An exploration of these possibilities will overstep the bounds of this book, but this is not to imply that they have nothing to do with jurisprudential study. The problems of liberty and obedience are very much its concern. The 'legal' and 'non-legal' motivations behind them are mutually influential and to draw a boundary between them is like trying to draw a line between night and day.

The last aspect of this problem is the promotion of liberty with a sense of obligation[4]. At present too much emphasis is placed on 'rights' and too little on duties. Law *serves* society; it should, therefore, help to promote a sense of obligation and to ascribe primacy to duties rather than to 'rights'[5]. The welfare state has done much to foster insistence on rights. It is not that welfare services are bad, but that they can have undesirable side-effects unless there is a corresponding emphasis on what people owe to society in return for the benefits they receive[6]. How a sense of obligation is to be instilled through law involves delicate questions of policy. Perhaps, something might be done by withholding welfare benefits from the families of those who strike at society, which has to bear the responsibility for them; but what constitutes 'striking at society' and who decides this need to be worked out with the utmost care. Industrial action by workers and unions is a sphere of activity that springs immediately to mind and is a peculiarly sensitive one. Nowadays the inter-dependence of people in society is such that whole sections of the nation, sometimes the nation itself, can be stricken into impotence

3 With regard to Christianity, for instance, a comparison of the 'facts' on which it is based with the legal conception of 'facts' and methods of establishing these might induce a revised and perhaps more acceptable attitude towards 'belief'. For the unpreparedness of lawyers to cope with religious 'belief', see *US v Ballard* 322 US 78 (1944); 329 US 187 (1946), on appeal twice to the Supreme Court from 138 F (2d) 540, and 152 F (2d) 941, concerning Ballard's belief that he had talked and shaken hands with Jesus Christ in San Francisco. Also, the legal techniques of interpreting precedents and statutes might be deployed in interpreting religious texts. For a suggestion, see Dias 'Law at the End of its Tether' [1972B] CLJ at 312-314.

4 See on this problem Cole 'Private Morality and Public Law' (1968) 54 Am BAJ 158; Morris 'American Society and the Rebirth of Civil Obedience' (1968) 54 Am BAJ 653.

5 For this reason Honoré's treatment of justice from the angle of claims alone seems unduly one-sided: 'Social Justice' in *Essays in Legal Philosophy* (ed Summers) p 61. Some of the greatest philosophies, notably that of the ancient Jews, stress the primacy of obligation (see pp 72-73 ante). It is also central to the theory of Duguit, eg *Law in the Modern State* (trans F and H J Laski) (see pp 436-439 post). In a recent analysis of justice, Rawls brings in, subject to qualification, the obligation towards society to uphold just institutions as long as one accepts its benefits: *A Theory of Justice* (see pp 000, 000 post). Some of those who currently produce pornography assert a liberty to indoctrinate children with their views. They may be sincere in what is to them a crusade. But (a) it is curious that they are also foremost in opposing indoctrination of children with religion on the ground that they cannot think for themselves. Besides, (b) indoctrination is not a bad thing as such; it depends on what is instilled. Religious indoctrination at least teaches service and duty to others; pornographic indoctrination teaches self-indulgence. From a social point of view, the former is tolerable, the latter is not.

6 See p 67 ante.

by one group or other taking strike action[7]. As long as the liberty to do this sort of thing is neither limited nor controlled[8], the law would appear to condone a form of blackmail, especially when such action is calculated to coincide with occasions when maximum hardship and inconvenience can be inflicted on countless numbers of persons, who are in no way responsible for or involved in the disputes. In a different sphere, that of crime, criminals could be made to do social work as reparation in proportion to their offences; but this is hedged by difficulties with trade unions[9].

The development of no-fault insurance to replace the traditional basis of liability in tort law in many areas[10] poses a problem of conflict. On the one hand, it meets the need to compensate victims, especially those who sustain catastrophic loss through some trivial fault, by protecting them against impecunious defendants. On the other hand, in so far as it may reduce or abandon emphasis on wrongdoing it could have a long term effect on standards. Severing the link between compensation for plaintiffs and the fault of defendants is beneficial provided the inadmissible inference is not drawn that because compensation for victims is not dependent on fault, therefore fault is irrelevant. Other means, administrative perhaps, should be devised to register disapproval of fault, eg loss of bonuses, increased premiums, contributions to insurance funds etc, the extent of which might well be related to the degree of fault[11]. Popular psychology has spread the idea that deviant behaviour is the result, not of the delinquent's moral shortcoming, but of the failure of others (parents, environment etc). The incessant barrage along this line through the mass media does not help with the problem of instilling a sense of obligation, if it does not actually hinder. The broad proposition has some truth, but it has come to be regarded as if it represents the whole truth; which it does not. For, logically, if the failure of the present generation is attributable to the past, the failure of the next generation must be attributable to the present. In short, to foist responsibility away from oneself and onto others in the past, *is* to accept responsibility now for others in the future.

It is the latter aspect of this proposition that needs to be put across, since as soon as a person can be made to appreciate the responsibility of others and of circumstances for what he is, that is precisely the moment at which he has become capable of appreciating his own responsibilities. The present-day tendency, however, is such that there is no lack of persons to raise an outcry against any insistence on self-discipline or show of firmness in dealing with trouble-makers, or potential trouble-makers, at any rate on those occasions that achieve publicity[12]. The consequences of this are

7 Cf Duguit's doctrine of 'social solidarity', pp 436–439 post. For the problem, see *Lord MacDermott* ch 7.

8 In *Collymore v A-G* [1970] AC 538, [1969] 2 All ER 1207, the Privy Council held that the liberty of association was not impaired by limiting the liberty to strike.

9 McClean 'Reparation by the Offender' (1971) 34 MLR 436; Wootton 'Community Service' [1973] Crim LR 16; Powers of Criminal Courts Act 1973, ss 14–17.

10 New Zealand: Accident Compensation Act No 43 of 1972 (amended by the Accident Compensation Amendment (No 2) Act 1973). For Great Britain, see the Report of the Royal Commission *On Civil Liability and Compensation for Personal Injury* (Cmnd 7054–1).

11 Thus meeting Viscount Simond's point in *The Wagon Mound* [1961] AC 388 at 426–427, [1961] 1 All ER 404 at 413.

12 Eg the Archbishop of Canterbury's call to the nation for a spiritual regeneration was condemned by the Bishop of Southwark, who chose to treat it as a defence of capitalism (see *The Times* 16 October and 1 November 1975); the Editorial in the *Law Guardian* July/August 1970 (No 61) protested against the sentences passed on the 'Garden House' rioters; Drewry 'Freedom and Order' (1970) 120 NLJ 1142 criticised *Public Order*

incalculable: it discourages the law-abiding, it undermines law-enforcement and, worst of all, minimises the chance of inculcating any sense of obligation.

Psychologists and psychiatrists will probably admit that their subjects are still in their infancy, for they have not yet evolved the wherewithal by which they can know when their theories are wrong[13]. There is seldom any difficulty in weaving plausible theories in these subjects; the difficulty lies in testing them. A sense of social obligation is certainly not promoted by plunging into penal reform on such hypotheses or by ameliorating punishments without at least substituting some sort of compulsory service by wrongdoers either to society or to their victims. Be kind by all means, but not at the expense of standards. To be merciful to a wrongdoer is one thing; to carry that to the point of refusing to see any wrongness in the doing is quite another. It is as foolish to have a sense of compassion without a sense of social obligation as it is to have no sense of compassion at all.

There is now greater distrust and lack of confidence in authority than used to be the case. So obsessed are certain people with the perils of the abuse of power that they are blind to the perils of the abuse of liberty. To advocate liberty as such is to adopt a negative attitude, for the gist of liberty is the *absence* of duty. However much its champions may believe that they are taking up a positive stand, they are not mindful of what people actually do with their liberties, but are far more concerned to see that there shall be fewer and fewer limitations and controls, or even none at all. Added to this is the point that the doom of liberty itself lies at the end of the road of unlimited liberty. A more positive and constructive approach would be to concentrate on duty, on obligations towards society, and to work outwards from these towards liberties. *Some* exercise of power there must be to prohibit certain forms of liberty; and a sense of values and standards will help to keep in perspective the dangers of the misuse of both power and liberty[14]. The absence of such a sense is all the sadder in those critics of authority, who are usually so well meaning.

The prevention of the abuse of power and liberty must end on a speculative and inconclusive note. They remain problems because the solutions to them, which are two of the main tasks of justice, are as yet far away.

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itical Centre pamphlet) on the ground that there should have been prior 'agreement about basic definitions'; Hepple 'Aliens and Administrative Justice: the Dutschke Case' (1971) 34 MLR 501, criticised the deportation of an acknowledged agitator. How do any of these help in dealing with future situations in the present climate? Neither casuistry nor legalistic arguments derived from the analysis of bygone incidents take account of the fact that in the days when the British 'rule of law' gave sanctuary to Marx, Engels, Kropotkin and others, it was operating in a vastly different social, political and world arena from that of today.

13 For an apt statement about sociology, see Sprott *Sociology* p 39, quoted at p 421 n 2 post.

14 For Lord MacDermott the preservation of public order effectually 'is a first task': *Lord MacDermott* p 7; and for the moral quality in law, see pp 8, 195. Goodhart 'Freedom under the Law' (1960) 1 Tasm LR 375, shows how legal control came to be thought of as necessary to freedom. See also Carritt 'Liberty and Equality' (1940) 56 LQR 61; Hale *Freedom Through Law*. On the need to uphold authority for the sake of human freedoms, see Humphrey 'Human Rights and Authority' (1970) 20 UTLJ 412.

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CHAPTER 7

Justice in deciding disputes: precedent

The fourth major task of justice, and one which lies especially within the province of lawyers, is giving just decisions in disputes. In Aristotelian terms this would fall under 'corrective justice'.

Deciding disputes involves three kinds of knowledge: knowing the facts, knowing the law applicable to those facts, and knowing the just way of applying the law to them. Knowing the law involves knowing how to find it in judicial precedents, statutes and immemorial customs and will be dealt with in that order in this and the following two chapters; knowing the just way of applying the law will be dealt with in Chapter 10.

As mentioned before, the doctrine of precedent in Britain has assumed a special form, known as *stare decisis*, the effect of which is that judicial decisions have binding force and enjoy law-quality *per se*. Bindingness depends on the hierarchy of courts; higher courts bind lower courts, never *vice versa*. Law-quality relates to the principle behind a decision, its *ratio decidendi*, as stated by Jessel MR: 'The only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided'[1]. The two aspects are independent. A decision of the High Court, for example, is 'law' although it is not binding on any court superior to itself. Two conditions had to be satisfied before *stare decisis* could become established. (1) There had to be a settled judicial hierarchy before there could be any clear-cut doctrine of *binding* authority, for until then it could not be known whose decisions bound whom. (2) There had also to be reliable reports of cases; if cases are to be authoritative as 'law', there should be precise records of what they lay down. Only about the middle of the last century were these conditions fulfilled, and it is from about then that the modern doctrine emerges.

Stare decisis should also be distinguished from another doctrine known as *res judicata*, which means that the final judgment of a competent court may not be disputed by the parties or their successors or any third parties in any subsequent legal proceeding. The main differences between the two doctrines are:

(1) *Res judicata* applies to the decision in the dispute, while *stare decisis* operates as to the ruling of law involved.
(2) *Res judicata* normally binds only the parties and their successors. *Stare decisis*, relating as it does to the ruling of law, binds everyone, including those who come before the courts in other cases.
(3) *Res judicata* applies to all courts. *Stare decisis* is brought into operation only by decisions of the High Court and higher courts.

1 *Osborne v Rowlett* (1880) 13 ChD 774 at 785.

(4) *Res judicata* takes effect after the time for appealing against a decision is past. *Stare decisis* operates at once[2].

HIERARCHY OF COURTS

As long as the hierarchy of courts remained unsettled, the modern doctrine of bindingness could not come into existence. It assumed substantially its present shape in the Judicature Acts 1873-1875, and is now modified by the Courts Act 1971. Rivalry used to exist, not only between the common law courts and Chancery, but between the common law courts themselves. After these had passed away, and even before the Judicature Acts, the modern doctrine began to make its appearance[3]. The Judicature Acts finally reorganised the courts into an unified structure surmounted by the House of Lords as the ultimate appellate court. Such a clear pyramid of authority was essential to the operation of any doctrine of bindingness, the full rigour of which was achieved when the House of Lords decided in 1898 that it was bound by its own decisions[4]. Since then the difficulties of too rigid an application of the doctrine led to the admission of exceptions, and in 1966 the House of Lords announced that it will no longer be bound by its decisions[5].

Only decisions of the High Court and above are quotable as 'law'[6]. With regard to the binding force of decisions, the rule is that higher courts bind lower courts; courts of co-ordinate authority do not bind each other. The High Court does not bind itself. Where two High Court decisions are in conflict, the judge in a third case should follow the later decision, unless he is convinced that the judge in the later decision was wrong in not following the earlier case[7]. The Court of Appeal and possibly Divisional Courts still consider themselves bound by their own decisions. The detailed rules govern-

2 Art 59 of the Statute of the International Court of Justice expressly applies the doctrine of *res judicata* to its decisions, and expressly rejects *stare decisis*. It does not specifically allude to the wide doctrine of precedent which has in fact been acted on. See eg *The Lotus* (1927) PCIJ Ser A No 10; *The Corfu Channel Case* (1948) ICJ Reps 15.

3 See eg the classic statement of Parke J in *Mirehouse v Rennell* (1833) 1 Cl & Fin 527 at 546.

4 *London Tramways Co v LCC* [1898] AC 375. On the persistent miscitation of this case as '*London Street Tramways Co*', see Leach 'Revisionism in the House of Lords: the Bastion of Rigid *Stare Decisis* Falls' (1967) 80 Harv LR 800 n 11.

5 *Note (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234. The Court of Appeal has also declared itself bound by its own decisions, subject to certain qualifications: *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293; and see *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487, [1975] 1 All ER 1076. Since the Note (Judicial Precedent) in the House of Lords, the Court of Appeal has reaffirmed the fact that it continues to be bound by a decision of the Lords, however questionable it may be: *Conway v Rimmer* [1967] 2 All ER 1260, [1967] 1 WLR 1031, subsequently reversed by the House of Lords [1968] AC 910, [1968] 1 All ER 874, which was the first case since the Note (Judicial Precedent) which their Lordships refused to follow their own previous decision.

6 Crown Courts, established by the Courts Act 1971, are 'superior courts' according to s 4 (1). This is so when they hear cases on indictment, but they are also said to bear some of the 'stigmata of inferior courts': *Sirros v Moore* [1975] QB 118, [1974] 3 All ER 776.

7 *Colchester Estates (Cardiff) v Carlton Industries plc* [1984] 2 All ER 601, [1984] 3 WLR 693. *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA; *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC; *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67, [1984] 3 All ER 240. The Criminal Division of the Court of Appeal is bound in the same way as the Civil Division except where the liberty of the subject is involved, in which case the court will not follow a previous decision in the interests of justice: *R v Spencer* [1985] 1 All ER 673, [1985] 2 WLR 197.

ing the hierarchy of authority will not be discussed here for want of space, but they are readily accessible elsewhere[8]. Certain special aspects, however, do require mention. The first concerns the rule that the Court of Appeal is bound by its own decisions. This is known as the rule in *Young v Bristol Aeroplane Co Ltd*[9], and it is subject to significant qualifications:

(1) If two decisions are in conflict, the Court of Appeal must choose between them.
(2) If a decision, although not overruled, is inconsistent with a decision of the House of Lords or of the Judicial Committee of the Privy Council[10], the Court of Appeal is not bound by it.
(3) If a decision was given *per incuriam*, ie in ignorance of a statute or other binding authority, the Court of Appeal is not bound by it; nor may it be bound where the previous court had followed an incomplete report of a still earlier case[11]. The *incuria* rule does not apply where the previous court, which is alleged to have overlooked an earlier case, had in fact alluded to it[12]; nor does it apply where the earlier of the conflicting cases exerted only persuasive authority[13].

These exceptions create difficulties. The first allows the Court of Appeal to choose between two of its own conflicting decisions[14], which seems eminently necessary. Its application, however, is far from straightforward. In *Fisher v Ruislip-Northwood UDC and Middlesex County Council*[15] the Court of Appeal refused to be bound by earlier decisions of its own which distinguished a still earlier case. It held instead that they were in conflict and proceeded to follow the decision which had been held in the later cases to be distinguishable. This seems inconsistent with the decision in *Hogan v Bentinck West Hartley Collieries*[16] where the Court of Appeal held that it was not competent to consider two earlier decisions as being in conflict when it had previously treated them as not inconsistent. More serious is the implication of saying that two decisions are in conflict. Logically the exception contradicts the rule. For, if the Court of Appeal propounds a rule in one case and a different rule in another, the later of the two must either have been decided

8 Eg Cross *Precedent in English Law*, chs 3–4; for literature, see Dias *Bibliography* pp 26–32.

9 [1944] KB 718, [1944] 2 All ER 293.

10 *Re Polemis & Furness Withy & Co Ltd* [1921] 3 KB 560, disapproved in *The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, not followed in *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518, [1964] 1 All ER 98. See also *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210 at 217, 219, [1971] 3 All ER 708 at 711, 712–713.

11 *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293.

12 For an inadmissible application of the *incuria* rule, see *Broome v Cassell & Co Ltd* [1971] 2 QB 354, [1971] 2 All ER 187, disapproved on appeal by the House of Lords [1972] AC 1027, [1972] 1 All ER 801. For a limit on the *incuria* rule, see *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801.

13 *Johnson v Agnew* [1978] Ch 176 at 189, 198, [1978] 3 All ER 314, 320, 328 (varied [1980] AC 367, [1979] 1 All ER 883).

14 *The Nouvy Sacc* [1979] QB 236 at 249–250, [1978] 2 All ER 297 at 305; *W A Sherratt Ltd v John Bromley (Church Stretton) Ltd* [1985] 1 All ER 216, [1985] 2 WLR 742.

15 [1945] KB 584, [1945] 2 All ER 458, preferring *Morrison v Sheffield Corpn* [1917] 2 KB 866 to *Lyus v Stepney Borough Council* [1941] 1 KB 134, [1940] 4 All ER 463; *Wodehouse v Levy* [1940] 2 KB 561, [1940] 4 All ER 14, and *Fox v Newcastle-upon-Tyne Corpn* [1941] 2 KB 120, [1941] 2 All ER 563.

16 [1948] 1 All ER 129.

in ignorance of the earlier, in which event it falls under the third exception and is accordingly invalid; or it must have violated the rule that the court is bound, in which event also it is invalid. To assert that the court may choose between them and perhaps prefer the later case is in effect to escape from the rule itself by according validity to the very case which has violated it. If, on the one hand, it is thought that the exception applies only to decisions prior to *Young's Case*, not only is there nothing in support of such a view, but it would also be difficult to reconcile it with the declaratory theory of precedent. If, on the other hand, the logical view is followed that it must be the earlier case that is the binding authority, a curious possibility is opened up. In *Wynne-Finch v Chaytor*[17] the Court of Appeal refused to be bound by its own previous decision; therefore, the later pronouncement in *Young's Case* that it is bound must be invalid. Even if so radical an assault on *Young's Case* is considered too venturesome, the Court of Appeal might still be able to argue that these two cases are in conflict and that, being free to choose under the rule in *Young's Case*, it chooses to abide by *Wynne-Finch v Chaytor*. Whatever view is taken of these odd possibilities, it is clear that by virtue of this exception the court has liberty to escape from the rigour of its own doctrine.

The position of the High Court when confronted with conflicting decisions of the Court of Appeal is also not clear. Oliver J suggested that the High Court, like the Court of Appeal, should be free to choose or, if not, he felt he should follow the later case[18]. Donaldson J, on the other hand, felt bound to follow the earlier of the conflicting decisions since the latter had violated the doctrine of *stare decisis* and following it would be inconsistent with that doctrine[19].

The second exception to the rule in *Young's Case* is where the earlier decision of the Court of Appeal is regarded as inconsistent with a subsequent decision of the House of Lords. Is it open to the court to differ from a previous decision on the ground that that decision was inconsistent with a decision of the House of Lords which preceded it? This would seem to be what was done in *Fitzsimons v Ford Motor Co Ltd (Aero Engines)*[20], and in *Wilson v Chatterton*[1], where the Court of Appeal refused to follow previous decisions of its own on the ground that they were inconsistent with still earlier decisions of the House of Lords. They amount to asserting that a decision of the Court of Appeal which came after a decision of the House of Lords and which distinguished it could be disregarded as wrongly decided, but under the principle of *Young v Bristol Aeroplane Co Ltd*, this is exactly what is not permissible. However, in *Williams v Glasbrook Bros Ltd*[2], the Court of Appeal returned to the statement of principle in *Young's Case* and held that if in a previous decision of the court a decision of the House of Lords had been considered, the court could not now say that that previous decision was inconsistent with the decision of the House of Lords. *Fitzsimons' Case* was not brought to the notice of the court in *Williams v Glasbrook Bros Ltd*, and no member of the court in the former case was sitting in the later appeal. The

17 [1903] 2 Ch 475.
18 *Midland Bank Trust Co Ltd v Hett, Stubb & Kemp (a firm)* [1979] Ch 384 at 404-405, 432, [1978] 3 All ER 571 at 584-585.
19 *Uganda Co (Holdings) v Government of Uganda* [1979] 1 Lloyds Rep 481.
20 [1946] 1 All ER 429.
1 [1946] KB 360, [1946] 1 All ER 431.
2 [1947] 2 All ER 884.

scope of this second exception may yet prove to be very far-reaching and it is to be noted that the Divisional Court of King's Bench has since held itself at liberty to ignore an earlier decision of the Court of Appeal on the ground that the Court of Appeal had not examined a decision of the House of Lords[3].

The third exception raised by the Court of Appeal in *Young's Case* to the doctrine that the court is bound by its own decisions is where the previous decision was given *per incuriam*, that is to say, in ignorance of a statutory provision or binding authority[4]. If the Court of Appeal had misapprehended the principle or material point in a previous decision, it would appear that the case, in which the error had been made, is not binding. Mere inadequacy of argument does not bring a case within the *incuria* rule, but if relevant authorities have not been cited to the court the rule will apply. If the reasoning behind a decision is shown to have been faulty by a higher court, or even by a court of co-ordinate authority, that decision may again be disregarded. This third exception opens a wide gap in the doctrine of *stare decisis*, for, as Sir Carleton Allen has demonstrated[5], in these days of the multiplication of reports and decisions it is increasingly easy for a court to come to a decision without having considered all the relevant authorities. In the result, the exceptions to the rule in *Young's Case* are more significant than the rule itself, for they point towards a relaxation in the strict doctrine of *stare decisis*[6].

Turning next to the House of Lords, it might be noted that the House, which for long used to be bound by its own decisions subject to some exceptions, has altered this practice since 1966 and now considers itself free to depart from its previous decisions[7]. The Judicial Committee of the Privy Council, as the highest appellate court from different parts of the Commonwealth (more so in the past than now), used to hear appeals from jurisdictions where different systems of law prevail, eg Roman-Dutch law. Clearly, a decision given in one system could not be binding in a case coming from a different system. With regard to any one particular system, the Privy Council has stated that as long as there is a higher court of appeal, such as itself, a lower appellate court is right to consider itself bound by its own

3 *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1951] 1 KB 711, [1951] 1 All ER 268 (affd [1952] 1 KB 338, [1952] 1 All ER 122).

4 Explained in *Morelle Ltd v Wakeling* [1955] 2 QB 379 at 406, [1955] 1 All ER 708 at 718; on which see Note in (1955) 18 MLR 602. As to decisions given in ignorance of authoritative cases, see Lord Goddard CJ's views in *Moore v Hewitt*, [1947] KB 831 at 835, [1947] 2 All ER 270 at 272; and *Nicholas v Penny* [1950] 2 KB 466 at 473, [1950] 2 All ER 89 at 92. Quaere as to a decision in ignorance of a rule of statutory interpretation: *Royal Crown Derby Porcelain Co Ltd v Russell* [1949] 2 KB 417, [1949] 1 All ER 749.

5 Allen *Law in the Making, Excursus C.*

6 Possible new exceptions: (i) decisions overruled by statute, eg *Thomson v Moyse* [1961] AC 967 at 989, 1006, [1960] 3 All ER 684 at 699; (ii) decisions with more than one *ratio decidendi*, as to which see p 143 post; (iii) narrower conception of the *ratio*, on which see Cross '*Stare Decisis* in Contemporary England' (1966) 82 LQR 203; (iv) an interlocutory order made by only two Lords Justices if it is thought to be wrong: *Boys v Chaplin* [1968] 2 QB 1, [1968] 1 All ER 283 (affd [1971] AC 356, [1969] 2 All ER 1085).

7 *Note (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234. The first case in which the House refused to follow a previous decision of itself was *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874. For an examination of the position in the Court of Appeal and the House of Lords, see Cross *Precedent in English Law* chs 3-4; Blom-Cooper and Drewry *Final Appeal* ch 4; Dias *Bibliography* pp 28-31.

decisions[8]. However, it has also said that whether such lower appellate court should or should not follow a decision of itself, which is thought to be wrong, is a matter of policy of which the local court is a better judge than the Privy Council[9].

Finally, since Britain's accession to the European Economic Community the status of Community case law in British courts needs to be considered. Art 177 of the Rome Treaty lays down that when questions concerning the interpretation of the Community Treaties or the validity of measures taken by Community institutions (Commission, Council of Ministers, European Court) come before national courts, a subordinate court *may*, and final court *must*, request the European Court to give a preliminary ruling[10]. The European Court will only provide an abstract interpretation of the law; it will not consider the merits of the dispute, or its facts, or relevance of the facts to the point at issue, or the validity of any rule of national law; nor does the European Court's pronouncement invalidate such rule. The municipal court should then try to avoid conflict if possible[11]. Only within these limits is a decision of the European Court 'binding', if that is the appropriate word, on the municipal court which requests a ruling. What effect has such a decision on the courts of other member states? The European Court has ruled that its judgments are not binding precedents for national courts generally, but that the courts of any country may give them that effect if they wish[12]. Decisions of other municipal courts enjoy no more than persuasive force in British courts as they have always done, perhaps with the difference that such persuasive force may be greater in Community matters than in others because of the shared aim of member states to harmonise their economic development. Decisions of British courts will of course continue to bind other British courts in the ordinary way[13].

Are the rules regulating the binding force of precedents rules of law or of practice? The point has been discussed principally in connection with the

8 *A-G of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637 at 659-660, [1979] 3 All ER 129 at 139-140.

9 *Geelong Harbor Trust Comrs v Gibbs Bright & Co (a firm)* [1974] AC 810 at 818-819, [1974] 2 WLR 507 at 512.

10 For an important discussion, see *H P Bulmer Ltd v J Bollinger SA* [1975] Ch 401, [1974] 2 All ER 1226; and also *Van Duyn v Home Office* [1974] 3 All ER 178, [1974] CMLR 347. The European Communities Act 1972, s 3, says that questions of Community law are to be treated as questions of law, not of fact.

11 See pp 106-108 ante.

12 Municipal courts may put the question again in order to invite the European Court to review its practice: Case 28-30/62 *Da Costa en Schake NV v Nederlandse Administratie van Belastingen* [1963] CMLR 224 at 237, 238; Case 28/67 *Molkerei Zentrale Westfalen-Lippe v Hauptzollamt Paderborn* [1968] CMLR 187 at 217. A French court has held that the decision of the European Court on a preliminary ruling was binding on all courts involved in the particular case: *Caisse Regionale de Sécurité Social du Nord-Est v Goffart* [1969] CMLR 24 (following the ruling of the European Court in [1967] CMLR 343). The German Federal Supreme Court has held such a decision to be binding even in other cases: *Re A Brewery Solus Agreement* [1975] 1 CMLR 611. Cf *SAFA v Amministrazione delle Finanze* [1973] CMLR 152 at 156.

13 This follows from the position with regard to any other rule of international law. 'A rule of international law, once incorporated into our law by decisions of a competent court, is not an inference of fact but a rule of law. It therefore becomes part of our municipal law and the doctrine of *stare decisis* applies as much to that as a rule of law with a strictly municipal provenance': Scarman LJ in *Thai-Europe Tapioca Service Ltd v Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agriculture Supplies (Import and Shipping Wing)* [1975] 3 All ER 961 at 969-970, [1975] 1 WLR 1485 at 1495. See also Lawton LJ [1975] 3 All ER at 967, [1975] 1 WLR at 1493.

former rule that the House of Lords was bound by its own decisions. By abolishing this in a *Note (Judicial Precedent)*[14] the House has treated it merely as one of practice[15], which means simply that a new rule of practice has been substituted for the old and is descriptive of what the House is now doing without prejudice to what it may decide to do in future. If, on the other hand, it were treated as a rule of law, there might be a doubt as to whether a rule of law can be unsettled by a practice statement forming no part of the decision of any dispute. Such speculation is devoid of practical significance, for it is clear that the House will continue for the foreseeable future to abide by the *Note (Judicial Precedent)*, which makes it futile to suggest that the old rule has not been changed. Even if the House had overthrown it in a decided case, then all this would have meant is that the prior pronouncement was an erroneous statement of law; but the new statement could in turn be dismissed as an error tomorrow, and so on. The point is that a pronouncement as to practice is indicative of what the House is now doing, so any question as to whether it should be labelled 'law' or 'practice' is quite unfruitful. Precisely the same argument applies to the Court of Appeal, which continues to be bound by its own decisions, but with the further point that even the House of Lords cannot decide as a matter of law whether or not the Court of Appeal is bound by itself. Any such pronouncement is bound to be *obiter*, since the matter will be resolved by the Lords on its merits and not on the point whether the Court of Appeal bound itself; which is what happened in *Young v Bristol Aeroplane Co Ltd*, itself[16].

LAW-QUALITY OF PRECEDENTS

Before any kind of doctrine of precedent can operate, there have to be reliable records of the decisions in previous cases and this is especially necessary for the doctrine of *stare decisis*.

Law reports

It has been pointed out by many writers that the history of *stare decisis* is the history of law reporting. Although the strict doctrine could not come into existence until reporting had attained an efficient standard, it is equally true

14 'Constitutional convention having the force of law': per Lord Simon in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 472, [1975] 3 All ER 801 at 816. See generally Evans 'The Status of Rules of Precedent' (1982) 41 CLJ 162; Goldstein 'Some Problems about Precedent', and Evans 'The Status of Rules of Precedent – a Brief Reply' (1984) 43 CLJ 88, 108.

15 [1966] 3 All ER 77, [1966] 1 WLR 1234.

16 [1946] AC 163 at 169, [1946] 1 All ER 98 at 100, where Viscount Simon approved of the practice of the Court of Appeal, but the observation was *obiter*. Cf Salmon LJ: 'The point about the authority of this court has never been decided by the House of Lords. In the nature of things it is not a point that could ever come before the House for decision': *Gallie v Lee* [1969] 2 Ch 17 at 49, [1969] 1 All ER 1062 at 1082 (affd sub nom *Saunders (Executrix of Will of Gallie) v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961. For a suggested distinction between 'prescriptive' and 'descriptive' practice, see J Stone (1969) 69 Col LR 1162 at 1168. Thus, the *London Tramways* rule had no binding effect in 1898, but by virtue of judicial practice since that date became 'a rule both *descriptive* of past procedure, and also *prescriptive* of a rule of law binding in the future'. The same would apply to the *Note (Judicial Precedent)* of 1966. The difficulty is to see how the prescriptive 'ought' derives from the descriptive 'is'.

that it was the habit of relying on precedents that gradually improved law reporting. The absence of reports, though inconvenient, did not preclude recourse to previous decisions. Memory was often relied on; and in the early days of equity, for instance, the absence of reports only led judges to refer to the Registrar's Books in which the facts, the steps in suit and the principles were set out[17].

Among the earliest writers no reliance on cases is to be found. Glanvil, writing at the end of the twelfth century, cited only one judgment in his treatise; Fleta and Hengham at the end of the thirteenth century quoted hardly any. The same is true of Fortescue in the late fifteenth century. The notable exception was Bracton, who compiled a *Notebook* of some two thousand cases as material for his treatise and employed some five hundred of them[18]. There was nothing resembling the modern use of precedent; he stated his view of what a rule should be and added an illustrative case.

It is possible that Bracton's use of cases may have had something to do with the appearance of the Year Books. These constituted the earliest law reports, but bore no resemblance to modern reports. Many were anecdotal in character, the authors being concerned to record asides and points of pleading rather than principle, and the decisions often passed unmentioned. Nevertheless, the Year Books were used by students and it is clear from occasional statements that judicial decisions were being treated as authoritative pronouncements of the law. Thus, Prisot CJ said in 1454:

> 'And moreover if this plea were now adjudged bad, as you maintain, it would assuredly be a bad example to the young apprentices who study the Year Books, for they would never have confidence in their books if now we were to adjudge the contrary of what has so often been adjudged in the Books'[19].

An utterance like this should not, however, be overestimated, and there was as yet no doctrine of *stare decisis*.

The Year Books, though useful, were not reliable reports and citation remained largely a matter of memory. The original record was the only official source of information[20], but resort to this was impractical in the daily work of the courts and, indeed, access to records was normally accorded only to lawyers acting for the Crown. The appearance of private compilations of cases was therefore the next landmark. Among the first, and of deservedly high repute, were the reports of Dyer and of Plowden, followed by the famous reports of Coke, which ceased in 1616. None of them was in modern dress for they consisted of lengthy accounts of pleadings and disquisitions upon the branches of the law involved. Shortly after this, but still in the seventeenth century, there emerged the idea that decisions of the Court of Exchequer Chamber were of binding authority[1]. This was perhaps because such decisions were given by groups of judges. The same idea did not apply to decisions of the King's Bench, Common Pleas or even of the House of

17 Winder 'Precedent in Equity' (1941) 57 LQR 245, 249.

18 Cf the *Practicks* of early Scots law in which important decisions were noted by judges and counsel for their own use: Smith *The Doctrine of Judicial Precedent in Scots Law* p 2.

19 YB 33 Hen VI Mich 17, fo 41. See also YB 32 & 33 Edw I (Rolls Series) 32, for a statement by counsel that 'the judgments to be given by you will be hereafter an authority in every *quare non admisit* in England'; and YB 3 & 4 Edw II (Seldon Series iv), 161, for a statement by Bereford CJ that 'by a decision on this avowry we shall make a law throughout all the land'.

20 For the distinction between 'record' and 'report', see Pollock 'Judicial Records' in *Essays in the Law* ch 9, especially at p 233; *A First Book of Jurisprudence* p 293.

1 Herbert CJ in *Godden v Hales* (1686) 11 State Tr 1166 at 1254–55.

Lords. Indeed, decisions of the last mentioned body, which enjoy such authority today, enjoyed virtually none in those days. One reason was that lay peers took part in the deliberations, often to the confusion and embarrassment of lawyers, and it was not until 1844 that they ceased to participate in purely judicial matters[2]. Another reason was that this assembly did not distinguish between its legislative and judicial functions, both of which were covered by parliamentary privilege. The publication even of judicial proceedings would have constituted a breach of it. Only in 1813 did Dow begin a series of House of Lords reports.

After Coke a period of indifferent reporting set in until the publication of Burrow's Reports, which cover the period from 1757 to 1771. These admirable compilations marked the beginning of the modern practice, for they distinguished between headnote, facts, argument and decision with a proper report of the judgment. The doctrine of *stare decisis* was beginning to cast its shadow. Thus, Blackstone spoke of 'an established rule' to follow previous cases 'unless flatly absurd or unjust'[3]. It would appear also that from about 1785 judges began to favour particular reporters chosen for each court and to prefer citation from them and no other[4]. Eighty years later, in 1865, the series of reports known as the 'Law Reports' was inaugurated by the Incorporated Council of Law Reporting. These enjoy the advantage of being revised by the judges before publication, but beyond that they are in no sense official. Law reporting remains, as always, a matter of private enterprise.

The question what cases should be reported bristles with problems. The decision rests ultimately with the individual reporter. 'Utility to the profession is the only test', said Pollock[5]. Another aspect of the matter is that there is, on the one hand, a need for as expeditious a service as possible, and on the other, that it is no easy matter to decide how useful a particular case is likely to prove. In 1936 the All England Law Reports began providing a rapid weekly service of cases both useful and otherwise. In 1953 the Council of Law Reporting introduced an alternative weekly service with an indication as to which of the reported cases would subsequently be more fully reported in the 'Law Reports'. These are by no means all; there are other current series.

Assessment of reports

A 'law report' means any account of a case vouched for by a barrister who was present at the hearing[6]. Today it is usual for a report to begin with catch-words indicating the main points involved, followed by a headnote summarising the facts and decision, then the arguments of counsel, but these are included only in some series, and finally the judgment or relevant portion of it.

2 *O'Connell v R* (1844) 11 Cl & Fin 155 at 421–426.

3 Bl *Com* I. 70.

4 Daniel *The History and Origin of 'The Law Reports'* p 265. For a list of 'authorised reporters' just prior to 1865, see Moran *The Heralds of the Law* p 20.

5 Pollock *Essays in the Law* p 249.

6 Pollock *Essays in the Law* p 243. It must be by a barrister: *Birtwistle v Tweedale* [1953] 2 All ER 1598, [1954] 1 WLR 190, on which see Megarry 'Reporting the Unreported' (1954) 70 LQR 246. Cf Moran *The Heralds of the Law* p 13, where there is no mention of barrister; but see also p 102. For a solicitor's note of proceedings, see *Thompson v Andrews* [1968] 2 All ER 419, [1968] 1 WLR 777.

The following points may be borne in mind in estimating the value of a report. In the first place, any of the old reports may be consulted, but their authority varies. Some, for example those of Coke or Burrow, are viewed with approval, while others, for example those of Barnardiston or Epinasse, are not[7]. In all old reports it is important to observe how fully the facts are stated and whether the judgment is reported *verbatim* or not. Secondly, if a case is reported in more than one report, all the versions should be compared, for significant discrepancies may appear[8]. Thirdly, as a general rule the Law Reports version, by virtue of having been revised by the judges, should be consulted in preference to others[9]. The question may be asked: Which is more authoritative—the original as taken down in court, or the subsequent revision? The Court of Appeal has ruled that it is the latter, since the former is only provisional and awaits approval by the judge. The judge should not, of course, alter the whole character of his judgment[10]. Fourthly, the best type of report is one which indicates the arguments of counsel and sets out the judgment, or relevant portion of it, *verbatim*. A report which only summarises the judgment should only be used in the absence of a fuller report, but may not even then carry much weight[11]. Finally, in the absence of all else the oral

7 Eg Denman CJ in *Small v Nairne* (1849) 13 QB 840 at 844; Evershed LJ in *Hamps v Darby* [1948] 2 KB 311 at 317-318, [1948] 2 All ER 474 at 475-476; Denning LJ in *Warren v Keen* [1954] 1 QB 15 at 20-21, [1953] 2 All ER 1118 at 1121.

8 See Pollock *A First Book of Jurisprudence* p 317, who also points out the importance sometimes of comparing the report with the record: *Essays in the Law* p 231. On *Williams v Carwardine* as reported in (1833) 4 B & Ad 621, and in 5 C & P 574, see Goodhart *Essays in Jurisprudence and the Common Law* p 11. Other examples of significant divergences: *Edwards v Jones* [1947] KB 659 at 664, [1947] 1 All ER 830 at 833 where not quite the same reason is given for refusing to follow a prior decision; *Barker v Levinson* [1951] 1 KB 342, [1950] 2 All ER 825 where a statement as to the criminal liability of masters for the acts of servants does not appear in the latter report; *Perry v Stopher* [1959] 1 WLR 415 at 420, where Hodson LJ alludes to a difference in the report of a previous case in [1953] 2 All ER 1599 and in [1953] 1 WLR 1486, and his observation is in fact omitted in [1959] 1 All ER 713; the report of *Woods v Martin's Bank Ltd* [1959] 1 QB 55 at 72, is preferable to those in [1958] 3 All ER 166 and [1958] 1 WLR 1018; *Re Philpot* [1960] 1 All ER 165 at 168, where attention is drawn to the reports of *R v Dickson* in [1950] 1 KB 394 at 398, and in [1949] 2 All ER 810 at 812, in which the phrases 'must be' and 'should be' appear respectively with reference to a point of procedure; in *R v Agricultural Land Tribunal for the South Eastern Area, ex p Bracey* [1960] 2 All ER 518, the applicant relied on a statement reported in [1953] 2 All ER 4 at 6, but which is omitted in [1953] 2 QB 147. The weekly issue (Part 14) of the All England Law Reports version of *Schlesinger v Schlesinger* [1960] P 191, contains a fuller report than that which subsequently came out in the bound volume of the same parts.

9 *Leather Cloth Co v Lorsont* (1869) LR 9 Eq 345 at 351; *Brentnall and Cleland v LCC* [1944] 2 All ER 552 at 555; *Duke of Buccleuch v IRC* [1967] 1 AC 506 at 527-528, [1967] 1 All ER 129 at 133; *National Bank of Greece SA v Westminster Bank Executor and Trustee Co (Channel Islands) Ltd* [1970] 3 All ER 656 n, [1970] 1 WLR 1400. Cf *CHT Ltd v Ward* [1963] 3 All ER 835 at 842, where the LR version of a case was rejected as unsatisfactory.

10 *Bromley v Bromley* [1963] P 111, [1964] 3 All ER 226. See also *Young v North Riding Justices* [1965] 1 QB 502 at 508, [1965] 1 All ER 141 at 143-144, where the omission from the revised version of a point included in the Justices of the Peace Report was considered; and *R v Cockburn* [1968] 1 All ER 466 at 468, [1968] 1 WLR 281 at 283-284, where the court repudiated a remark in another case, which is reported in the All England Law Reports and Weekly Law Reports, but is eliminated from the Law Reports and Criminal Appeal Reports.

11 Hallett J in *Rivoli Hats Ltd v Gooch* [1953] 2 All ER 823 at 824, [1953] 1 WLR 1190 at 1192, commenting on the summarised report of *Clayton Newbury Ltd v Findlay* in (1951) Current Law Consolidation 65 (a fuller report was immediately included in [1953] 1 WLR 1194, and, less fully, in [1953] 2 All ER 826). See also *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185, commenting on *Pritchard v Post Office* as reported in [1950] WN 310 and 1950 114 JP 370.

account of a case by a barrister is admissible, though again this may be of limited value[12].

Application of precedents

A precedent influences future decisions. Every decision is pronounced on a specific set of past facts and from the decision on those facts a rule has to be extracted and projected into the future. No one can foresee the precise situations that will arise, so the rule has to be capable of applying to a range of broadly similar situations against a background of changing conditions. It has therefore to be in general terms and 'malleable'. As pointed out at the beginning of the book, no word has one proper meaning, nor can anyone seek to fix the meaning of words for others, so the interpretation of the rule remains flexible and open-ended[13].

Applying a precedent to the instant case is a process of matching the fact-pattern of the precedent and the ruling thereon with the fact-pattern of the instant case; if they match, the rule is applied, if not, it is distinguished. This involves the first two kinds of knowledge mentioned at the start of this chapter, namely, knowing the facts and knowing the law applicable to those facts.

Knowing the facts

Knowing the facts of the instant case involves an exercise of discretion. This lies initially in believing or disbelieving the testimony of witnesses and weighing it on a balance of probability. Judges are human, so the quirks of individual personalities may also play some part occasionally[14]. The discretionary element is most significant in knowing how to *state* the facts, for, as pointed out in Chapter 1[15], it is not knowledge of facts, but knowledge of how to state facts that is relevant; and this applies to the statement of facts of both the instant and the precedent cases. As Lord Simon has said, 'What is relevant is not only the statement of material facts by the deciding judge, but also their re-statement by other judges in later cases'[16].

First, the art of knowing how to state facts involves the distinction between statements of primary and secondary (or inferential) facts: between saying, eg that A did so and so at such a time in such a place and saying that A acted negligently. 'Negligence' is commonly treated as a question of fact, but since it is a matter of inference from a set of primary facts two courts may state the inferential fact differently while agreeing on the primary facts[17].

Secondly, there is knowledge of how to state facts at different levels of generality, which makes it possible for the deciding judge and a judge in a later case to make different statements of facts. Thus, A may have driven a Rolls Royce car at 30 mph through Piccadilly Circus at 2 pm on a certain

12 See the observations of Lord Morton in *Chapman v Chapman* [1954] AC 429 at 464–465, [1954] 1 All ER 798 at 815, 816.

13 See Stone *Legal System and Lawyers' Reasonings* pp 35–36.

14 See pp 220–225 post.

15 See pp 7–8 ante.

16 *FA & AB Ltd v Lupton (Inspector of Taxes)* [1972] AC 634 at 658, 659, [1971] 3 All ER 948 at 964, 965.

17 *Benmax v Austin Motor Co Ltd* [1955] AC 370, [1955] 1 All ER 326.

Wednesday, run into B and broken his right leg. The individual A may be generalised into 'person'; the Rolls Royce car may be generalised into 'vehicle'; Piccadilly Circus into 'public highway'; 30 mph through Piccadilly Circus at 2 pm on Wednesday into 'negligence'; and B's broken right leg into 'physical injury to the person'. A restatement of these facts at a more general level would be: 'a person inflicted physical injury on another person by the negligent driving of a vehicle on the public highway'. An even more general form of it would be: 'the negligent infliction of physical damage'; and more generally still: 'the negligent infliction of damage'. The higher the level of generality, the wider the scope of the proposition. It is clear at a glance that 'negligent infliction of damage' is wider than just 'the breaking of a given person's right leg by the careless driving of a Rolls Royce car'. A later judge is at liberty to accept as the fact-statement of *A v B* a proposition at any level along the scale. Thus, one who is confronted with a situation in which a careless false statement has caused damage to person or property, and who wishes to utilise the decision in *A v B* in order to hold the defendant liable, would no doubt regard that case as authority for 'the negligent infliction of physical damage', since only at this level of generality would the ruling become wide enough to cover the instant case[18]. On the other hand, another judge, wishing to impose liability for pecuniary loss would no doubt prefer the widest interpretation of *A v B*, namely, 'the negligent infliction of damage'[19].

Thirdly, it is necessary to know how to select the material facts. The fewer material facts included in a statement, the wider is its scope. In *Rylands v Fletcher*[20] the facts were as follows: (i) A had a reservoir built; (ii) A employed B to build it; (iii) A was not himself negligent; (iv) B was negligent; (v) water escaped owing to B's negligent construction of the reservoir and damaged C's property. Only facts (i) and (v) were treated as material by the court. By ignoring the absence and presence of negligence in A and B respectively, and by generalising fact (i) into 'anything likely to do mischief', the decision creates the sweeping rule that whoever brings a 'mischievous substance' on to his land is liable for damage[1] caused by its escape, irrespective of negligence.

Connected with this, **fourthly,** is the ability of a later judge to review the material facts of the precedent and add to or subtract from the sum-total of facts selected by the deciding judge, or he may re-state the facts at a different level of generality. Such re-statements extend or restrict the ambit of the precedent. In *Wilsons and Clyde Coal Co Ltd v English*[2] the employers were held liable for the death of one of their employees owing to the default of another employee. At that date a servant could not hold his employer vicariously

18 Eg Asquith LJ in *Candler v Crane, Christmas & Co* [1951] 2 KB 164 at 189, [1951] 1 All ER 426 at 439; *Clayton v Woodman & Son (Builders) Ltd* [1962] 2 QB 533, [1961] 3 All ER 249 (revsd on the facts without affecting the principle [1962] 2 QB at 546, [1962] 2 All ER 891).

19 Eg *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201.

20 (1868) LR 3 HL 330, and see Goodhart 'The *Ratio Decidendi* of a Case' in *Essays in Jurisprudence and the Common Law* pp 17-18.

1 Subsequent interpretation of 'damage' leaves open whether it includes personal injury: *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500; *Shiffman v Order of St John* [1936] 1 All ER 557; *Hale v Jennings* [1938] 1 All ER 579; *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154, [1956] 1 WLR 85. Cf *Read v J Lyons & Co Ltd* [1947] AC 156, [1946] 2 All ER 471.

2 [1938] AC 57, [1937] 3 All ER 628.

liable for an injury inflicted by a fellow-servant because of the prevailing doctrine of common-employment, which has since been abolished. Therefore, to hold the employers liable, it was essential to the *ratio decidendi* to ignore the fact that the party at fault was a servant and to say that the employers were being held liable, not vicariously, but for the breach of a personal non-delegable duty to ensure that reasonable care would be taken. So stated, the rule would attach liability to the employer of even an independent contractor. In *Davie v New Merton Board Mills Ltd*[3], however, Viscount Simonds and Lord Reid appeared to place an interpretation upon *Wilsons' Case* which would dismantle this rule. They stressed the materiality of the fact that it was not a contractor but a servant who had been at fault, which would involve a fundamental reinterpretation of the case[4]. The Employer's Liability (Defective Equipment) Act 1969, has now overruled *Davie* and restored the original interpretation of *Wilsons* in statutory form. The point is even more vividly brought out in the two *Wagon Mound* cases. A quantity of furnace oil was carelessly allowed to spill overboard from the SS Wagon Mound into the waters of a harbour. In *Wagon Mound*[5] the Judicial Committee of the Privy Council proceeded on the finding of the lower court that, according to scientific opinion at that date, the ignition of the oil in such circumstances was not reasonably foreseeable, and accordingly held that there was no answerability in negligence for damage by fire. In *Wagon Mound (No 2)*[6], however, brought by different plaintiffs but based on the same occurrence, the lower court stated that a bare possibility of fire might have been foreseeable, but that the chance was so remote that it should be ignored. Accordingly, the defendants were held not liable on the basis that fire was not reasonably foreseeable. The Judicial Committee fastened on this advertence to even a bare possibility of fire as constituting a material difference between the first and the second case, and, reversing the lower court, held the defendant liable in negligence for fire damage after all. It will thus be seen how stressing one factor as material not only enabled two different courts to reach opposite results in the same case, but also enabled the same court to reach opposite results in two cases based on the same happening.

Fifthly, there is the art of knowing how to make different statements by taking different combinations of facts. The facts in *Donoghue v Stevenson*[7] may be listed as follows. (i) A was a manufacturer of ginger beer; (ii) A was assumed to have been negligent in that a snail was alleged to have been found in one of the bottles; (iii) acting under contract with a retailer, B, A delivered the tainted bottle to B without knowing that it contained a snail and thereby committed a breach of his contract with B; (iv) B, acting under contract with C, innocently passed the bottle to C, thereby committing a breach of his contract with C; (v) C innocently passed the bottle to D; (vi) there had been no opportunity for an intermediate examination of the bottle

3 [1959] AC 604. [1959] 1 All ER 346 (overruled by the Employer's Liability (Defective Equipment) Act 1969).

4 [1959] AC at 621-622, 631, [1959] 1 All ER at 351-353, 358. See now *Clerk & Lindsell on Torts*, § 10-102. See also the attenuation of *Bailey v Geddes* [1938] 1 KB 156, [1937] 3 All ER 671, in *Knight v Sampson* [1938] 3 All ER 309; *Chisholm v London Passenger Transport Board* [1939] 1 KB 426, [1938] 4 All ER 850; *Wilkinson v Chetham-Strode* [1940] 2 KB 310, [1940] 2 All ER 643; *London Passenger Transport Board v Upson* [1949] AC 155, [1949] 1 All ER 60.

5 [1961] AC 388, [1961] 1 All ER 404.

6 [1967] 1 AC 617, [1966] 2 All ER 709.

7 [1932] AC 562.

at any stage since it left A; (vii) D was allegedly poisoned by drinking the remains of the snail; (viii) this being a Scottish case, D sued A in the Scottish courts, and the case was referred to the House of Lords on a preliminary point. It was held that, assuming A had been negligent in leaving a snail in the bottle, A would be liable to D. The case was remitted to the Scottish court for a decision on fact (ii), namely, whether there had in truth been a snail in the bottle. Different *rationes decidendi* can be extracted by taking different combinations of the above facts. In the first place, on fact (viii) alone it might have been argued that an appeal from Scotland is not binding on English courts, since Scots law is a different system[8]. Secondly, on facts (i), (ii), (vi) and (vii) it could be said that a negligent manufacturer is liable for damage to the ultimate consumer where there is no likelihood of an intermediate examination—the 'manufacturer' proposition. Thirdly, on facts (ii), (iii) and (vii) it could be said that any one who negligently misperforms a contract and physically damages a third party, whom he ought reasonably to have contemplated as likely to be affected, is liable to such third party in tort, though he would not be liable in contract. Fourthly, on facts (ii) and (vii) it could be said that anyone who negligently damages another, whom he ought reasonably to have contemplated as likely to be affected, is liable—the 'neighbour' proposition. Only in the light of later cases is it possible to determine the *ratio decidendi* of this important case. In recent years courts have come to regard the fourth proposition as being its ratio[9], while previously they generally adopted the second[10]. It is clear, therefore, that until recently tribunals had the choice of adopting one or the other[11]. In this way a case may even be given an interpretation quite other than that of the deciding judge[12].

Finally, as an aside, it may be remarked that *Donoghue's* case strikingly illustrates the point that what is important in law is the statement of facts rather than even their truth. The House of Lords remitted the case to the Scottish court for trial on the ruling laid down by the House, but this did not take place because of the death of one of the parties. So the truth as to whether or not there was a snail in the bottle was never established and is irrelevant to the ruling.

Wide though the possibilities are of making different statements of facts, they are limited by the consensual domain of the usual meanings of words. The facts of *Donoghue's* case would support any of the statements given above, but not, eg the statement that the defendant caused a public nuisance.

Knowing the law

What is 'law' in a precedent is its ruling or *ratio decidendi*, which concerns future litigants as well as those involved in the instant dispute. Knowing

8 Not after *Heyman v Darwins* [1942] AC 356 at 401, [1942] 1 All ER 337 at 361.

9 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294; *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492; *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201.

10 Eg *Howard v Walker and Lake (Trustees) and Crisp* [1947] KB 860 at 863.

11 'Wherever the court wishes to find for the plaintiff, that doctrine (the fourth proposition) will be invoked, just as it will be disregarded when the defendant is the favoured party': Landon in *Pollock on Torts* p 329.

12 Danckwerts LJ said that the decision in a previous case 'may be supportable, but not for the reasons given in the case by the learned judge with which I find myself unable to agree': *East Ham Borough Council v Bernard Sunley & Sons Ltd* [1965] 1 All ER 210 at 217, [1965] 1 WLR 30 at 40 (revsd [1966] AC 406, [1965] 3 All ER 619).

the law in this context means knowing how to extract the *rationes decidendi* from cases. Statements not part of the *ratio decidendi* are distinguished as *obiter dicta* and are not authoritative. Three shades of meaning can be attached to the expression '*ratio decidendi*'. The first, which is the translation of it, is 'the reason for (or of) deciding'[13]. Even a finding of fact may in this sense be the *ratio decidendi*. Thus, a judge may state a rule and then decide that the facts do not fall within it. Secondly, it may mean 'the rule of law proffered by the judge as the basis of his decision'; or, thirdly, it may mean 'the rule of law which others regard as being of binding authority'.

There is a temptation to suppose that a case has one fixed ruling which is 'there' and discoverable here and now and once and for all. This is not so, for the *ratio* is not only the ruling given by the deciding judge for his decision, but any one of a series of rulings as elucidated by subsequent interpretations[14]. The pronouncement of the judge who decided the case is a necessary step towards ascertaining the *ratio*, but the process by no means ends there; subsequent interpretation is at least as significant, sometimes more so. 'It is not sufficient', said Jessel MR,

> 'that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; and it is for a subsequent Judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle'[15].

Cases of overruling and reversal by superior authority are obvious instances of subsequent correction, but they are not within the scope of the immediate discussion. For, apart from these, the judge in a later case may restrict or enlarge the ruling as stated by the deciding judge, or he may reinterpret that ruling in such a way as to relegate it to the status of an *obiter dictum*. Accordingly, *ratio* is best regarded as a pointer towards the direction which subsequent decisions should take within a broad spectrum of variations. It is not something identifiable once and for all, but a continuing process, and as such it has to be viewed in a continuum of time.

(1) Difficult though the task of finding the *ratio* is, there would be a measure of agreement in propounding that no rule should be treated as *ratio* which would not support the ultimate order[16]. Where a stated-

13 Lord Denning MR in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 873, [1982] 3 All ER 394 at 400, (varied [1983] 1 AC 854, [1983] 1 All ER 34, HL).

14 Goodhart *Essays in Jurisprudence and the Common Law* pp 2, 25, says that 'the reason which the judge gives for his decision is never the binding part of the precedent', but 'never' is too strong a word, as pointed out by Schreiner JA in *Pretoria City Council v Levinson* 1949 (3) SA 305 at 316-317.

15 *Osborne v Rowlett* (1880) 13 ChD 774 at 785. Lord Reid, in attempting to find the *ratio decidendi* of an earlier case, said: 'If I had to try, the result might depend on whether or not I was striving to obtain a narrow *ratio*': *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 477, [1962] 1 All ER 1 at 12. Cf Devlin J in *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1 at 24, [1957] 1 All ER 583 at 594.

16 The reason *sine qua non*: Cardozo 'Jurisprudence' in *Selected Writings* (ed Hall) p 33. See also Lord Denning in *Penn-Texas Corpn v Murat Anstalt (No 2)* [1964] 2 QB 647 at 660-661, [1964] 2 All ER 594 at 597; *Harper v National Coal Board (Intended Action)* [1974] QB 614 at 621, [1974] 2 All ER 441 at 446. In *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (WLD) the ruling on a point which did not affect the ultimate decision was nevertheless made part of the *ratio* by being made the basis of the order on costs. See also *The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709, for the relationship between rulings and the ultimate order.

rule obviously bears no relation to the facts, it is no more than a *dictum*.

(2) Even when the deciding judge has given no reason for his decision, it may be possible for a subsequent tribunal to extract one from it[17]. However, no judge is required to accomplish the impossible. 'If it is not clear', said Viscount Dunedin, 'then I do not think it is part of the tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it'[18].

(3) It follows from what has previously been said that different *rationes* may be extracted from a case depending on different ways of stating the facts.

(4) More rarely, a judge may demote a proposition in a previous case from its status of *ratio* to that of *dictum*. Thus, the 'neighbour' proposition in *Donoghue v Stevenson* used to change its category according to whether the plaintiff or the defendant was thought entitled to succeed[19].

(5) Certain types of cases do not deserve to be authorities. One type, already alluded to, is that in which there is no discoverable *ratio decidendi*. Others are cases turning purely on facts[20], those involving the exercise of discretion[1], and those which judges themselves do not think worthy of being precedents[2]. Decisions on the interpretation of documents are sometimes used as precedents, which is regrettable since a court may find itself construing, not the document before it, but judicial interpretations of similar wording in other, slightly different documents[3]. 'I do not think it right', said Lord Denning MR, 'to look at previous cases in this way. The only legitimate purpose is to use them as a guide towards the meaning of words, so as to help in the search for the testator's intention. They should never be used so as to defeat his intention'[4].

The difficulties so far considered by no means exhaust the problems that may arise, some of which are incapable of solution. A case may involve two points, A and B, and a decision on either in favour of the defendant, be it

17 Eg *Giles v Walker* (1890) 24 QBD 656, discussed in *Davey v Harrow Corpn* [1958] 1 QB 60 at 71–72, [1957] 2 All ER 305 at 309–310.

18 *Great Western Rly Co v Mostyn (Owners), The Mostyn* [1928] AC 57 at 73. A remark by Lord Reid in *Nash (Inspector of Taxes) v Tamplin & Sons Brewery, Brighton, Ltd* [1952] AC 231 at 250, [1951] 2 All ER 869 at 880, to the effect that every case must have a *ratio decidendi* and that this should either be applied or distinguished appears to have been contradicted by Lord Reid himself in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 479, [1962] 1 All ER 1 at 14, where he despaired of finding the *ratio decidendi* of a previous case.

19 See *Fairman v Perpetual Investment Building Society* [1923] AC 74, as interpreted by Scott LJ in *Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343, [1941] 3 All ER 156, and in *Boylan v Dublin Corpn* [1949] IR 60, and in *Pearson v Lambeth Borough Council* [1950] 2 KB 353, [1950] 1 All ER 682. See also *Jacobs v LCC* [1950] AC 361, [1950] 1 All ER 737. See further *Adam v Ward* [1917] AC 309, as interpreted in *Egger v Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406.

20 *Simpson v Peat* [1952] 2 QB 24 at 28, [1952] 1 All ER 447 at 449; *R v Young* [1953] 1 All ER 21.

1 *Bragg v Crosville Motor Services Ltd* [1959] 1 All ER 613 at 615, [1959] 1 WLR 324 at 326.

2 *R v Stokesley (Yorkshire) Justices, ex p Bartram* [1956] 1 All ER 563 at 565, [1956] 1 WLR 254 at 258.

3 See the observations of Jessel MR in *Aspden v Seddon* (1875) 10 Ch App 394 at 397, 398. As to whether such cases should be reported, see Moran *The Heralds of the Law* ch 7, summarising the views of Lord Lindley, Mews and Burrows.

4 *Re Jebb, Ward-Smith v Jebb* [1966] Ch 666 at 672, [1965] 3 All ER 358 at 361.

supposed, is conclusive of the matter, while the plaintiff has to win on both A and B in order to win. Suppose that the judge decides in the defendant's favour on both issues. Which is the *ratio*, since either is sufficient to support the decision?[5] On the other hand, if he decides in favour of the plaintifff on point A, but in favour of the defendant on point B, who accordingly wins, and if it is accepted that no ruling can be *ratio* unless it supports the order made, then the decision on point A is *obiter*. Even as a *dictum* it may nevertheless carry such authority that a subsequent tribunal may feel obliged to follow it. If so, the nomenclature *ratio decidendi* or *obiter dictum* for the decision on point A ceases to matter. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[6] the House of Lords overthrew a rule by virtue of which the defendant had succeeded in the Court of Appeal and propounded a different rule, but with a qualification attached so that the defendant was still able to win. This rule and qualification together constitute the *ratio*; but even if it were said to be a *dictum*, the distinction is immaterial at this level of authority.

A judge may embark upon a line of reasoning involving a rule which justifies a certain conclusion. He may then proceed along another line of reasoning involving a different rule, wider or narrower, which also justifies that conclusion[7]. Lord Simonds once declared that if two reasons are put forward by a court for its decision, both should be accepted as part of the *ratio decidendi*[8]. One may later be rejected, as in *Fisher v Taylor's Furnishing Stores Ltd*[9] where the Court of Appeal rejected as incorrect one of the two grounds which it had given in an earlier case, and the rejection was later confirmed by both the Court of Appeal and the House of Lords[10]. Again, if the House of Lords has given two reasons for a decision, and declares subsequently that one of them is correct and the other wrong, the authoritative ruling is the correct one[11]. This shows how subsequent interpretation determines the *ratio decidendi* as between two stated rulings. Another illustration of the difficulty is *Donoghue v Stevenson*[12] in which there are three rulings justifying the result, the wide 'neighbour' rule, the narrower 'manufacturer' rule and the 'fallacy of contractual privity' rule. It has been pointed out that judges used to regard the first as being *ratio* or *dictum* according to the way in which they wished to decide. On the other hand, even the considered

5 In *Said v Butt* [1920] 3 KB 497, the judge made it clear that his decision on point B was additional, which makes it a *dictum*.

6 [1964] AC 465, [1963] 2 All ER 575. In the South African case of *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (WLD) the judge made his decision for the plaintiff on point A part of the *ratio decidendi* by basing his order as to costs on it. See also *The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709.

7 Eg Denning LJ in *Broom v Morgan* [1953] 1 QB 597 at 609-610, [1953] 1 All ER 849 at 854-855.

8 *Jacobs v LCC* [1950] AC 361 at 369-371, [1950] 1 All ER 737 at 741-742. To the same effect, Lord Bramwell in *Membery v Great Western Rly Co* (1889) 14 App Cas 179 at 187; Lord MacNaghten in *New South Wales Taxation Comrs v Palmer* [1907] AC 179 at 184; Greer LJ in *London Jewellers Ltd v Attenborough* [1934] 2 KB 206 at 222; Pearce LJ in *Cane (Valuation Officer) v Royal College of Music* [1961] 2 QB 89 at 114, [1961] 2 All ER 12 at 24; Stamp J in *Rogers v Longsdon* [1967] Ch 93 at 109, [1966] 2 All ER 49 at 57.

9 [1956] 2 QB 78, [1956] 2 All ER 78.

10 *Craddock v Hampshire County Council* [1958] 1 All ER 449, [1958] 1 WLR 202; *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20, [1958] 1 All ER 607.

11 Per Lord Denning MR in *Re Holmden's Settlement Trusts, Holmden v IRC* [1966] Ch 511 at 530, [1966] 2 All ER 661 at 666, 667 (affd [1968] AC 685, [1968] 1 All ER 148).

12 [1932] AC 562.

opinion of a judge on a point not raised or argued will probably be treated as a *dictum*[13]. The same applies to a proposition which is 'merely a proposition of law assumed by the [Board] to be correct for the purpose of that particular case'[14].

These complications multiply in appellate tribunals where there is a plurality of judgments. It may happen that all the judges agree in the result for different reasons. Suppose that each of five judges gives a different reason for arriving at the same result and without disagreeing with the reasons given by the other four. Such a case may be said to have five competing *rationes* and a subsequent tribunal may adopt any of them for the purpose of deciding the case before itself. Suppose instead that each of the five not only gives a different reason for the same conclusion, but also rejects the reasons given by the other four[15]. Here the difficulty in the way of adopting any one opinion is that it has been condemned in four others. Such a case, it is submitted, has no discoverable *ratio* and is, in any event, worthless as an authority. It has so far been assumed that the judges agree in the result. Where they disagree, further difficulties arise. As long as three at least out of five, or two out of three, concur in the result for the same reason, their view may be said to constitute the *ratio*[16]. Where the majority differ in their reasons while the minority agree on the reason for their dissent, it is difficult to say what the *ratio* is. The judge in a subsequent case will once more be able to exercise his discretion[17]. Finally, if a case has more than one issue and the tribunal is not only divided as to the result but also divided on each issue, the difficulties that arise cannot be resolved by any test. The judge in a subsequent case will be free to reject the case as having no *ratio*, or to place whatever interpretation he chooses upon it[18]. All this does not imply that the solution would be to have only one judgment, even if the court is agreed. Differences in presentation and wording will avoid the danger of any one judge's utterance being treated like an Act of Parliament[19].

Obiter dicta

Pronouncements of law, which are not part of the *ratio decidendi*, are classed as *obiter dicta* and are not authoritative. *Rationes* and *dicta* tend to shade into

13 Eg the views of Lord Denning in *Rahimtoola v HEH Nizam of Hyderabad* [1958] AC 379 at 423, [1957] 3 All ER 441 at 464.

14 *Baker v R* [1975] AC 774 at 789, [1975] 3 All ER 55 at 64, per Lord Diplock; *Barrs v Bethel* [1982] Ch 294 at 308, [1982] 1 All ER 106 at 116, per Warner J.

15 Lord Simonds is reported to have given this very example in the course of argument: REM in (1950) 66 LQR 298, quoting (1949) 23 Austr LJ 355, and contrasting the Scottish practice.

16 Eg *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87; *Jones v Secretary of State for Social Services* [1972] AC 944 at 1004, [1972] 1 All ER 145 at 180, per Lord Diplock.

17 *George Wimpey & Co Ltd v British Overseas Airways Corpn* [1955] AC 169, [1954] 3 All ER 661, analysed by Lord MacDermott CJ in *Walsh v Curry* [1955] NI 112. In *Harper v National Coal Board (Intended Action)* [1974] QB 614, [1974] 2 All ER 441, the Court of Appeal held itself free to adopt any of the reasons which supported the majority decision. It is to be noted that the rule adopted in South Africa is that in a five-judge court no proposition is to be regarded as being the *ratio decidendi* unless at least three judges give the same reason: *Fellner v Minister of the Interior* 1954 (4) SA 523 (A).

18 See the example discussed by Coutts in (1955) 71 LQR 24.

19 On this see Lord Reid 'The Judge as a Law-Maker' (1972) 12 JSPTL (NS), especially at pp 28-29; and in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1084-1085, [1972] 1 All ER 801 at 836.

each other. The former have law-quality and are binding on lower courts; *dicta*, too, have law-quality, but are not binding at all. *Vis-a-vis* a higher court even the *ratio decidendi* of a lower court decision has only persuasive force like that of a *dictum*. It has been pointed out that some *dicta* are so authoritative that the distinction between *ratio* and *dictum* is reduced to vanishing point. *Dicta*, which have no force, are propositions stated by way of illustration or on hypothetical facts[20]. Greater difficulties attend rulings of law which are subsequently relegated to the status of *dicta* by interpretation. The distinction in such cases between *ratio* and *dictum* is but a device employed by subsequent courts for the adoption or rejection of doctrine expressed in previous cases according to the inclination of the judges. An example would be the treatment of Lord Atkin's 'neighbour' proposition in subsequent cases.

The weight accorded to *dicta* varies with the type of *dictum*. Mere casual expressions carry no weight at all. 'Not every passing expression of a judge, however eminent, can be treated as an *ex cathedra* statement'[1]. On the other hand, *dicta* which have been acted upon over the years may acquire increasing respect[2]. A *dictum* may also be adopted as the *ratio decidendi* of a subsequent decision and will then acquire the authority of that tribunal. In *Zeidman v Owen*[3] Lord Goddard CJ said 'If we thought that the dicta, though *obiter*, expressed the true construction of the Act, we should feel we ought to follow them'. Finally, a suggestion has been offered that a distinction be drawn between *obiter dicta*, those irrelevant to the case, and *judicial dicta*, those relevant to some collateral matter but no part of the *ratio*[4]. The latter will generally be more persuasive than the former.

Subsequent history of a case

It should be abundantly clear from all this that the *ratio decidendi* of a case depends on the interpretation put upon it no less than on what the deciding judge himself propounded. Later history is thus an indispensable and continuing part of *ratio*. It also shows the limits of bindingness.

Reversal

A case may be reversed on appeal. The effect of reversal is normally that the first judgment ceases to have any effect at all. The situation is different if the case is affirmed or reversed by an appellate court on a different point from that on which the decision in the lower court was based. In one case, a Master of the Rolls said that in such a situation the previous decision will be 'of no effect at all'[5]. This probably goes too far, and in another case it was

20 A ruling on *assumed* facts, eg on a preliminary point, may well be treated as *ratio decidendi*, eg *Donoghue v Stevenson* [1932] AC 562; *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569, [1965] 3 All ER 560.

1 Lord Porter in *London Graving Dock Co Ltd v Horton* [1951] AC 737 at 748, [1951] 2 All ER 1 at 6.

2 Hodson LJ in *Triefus & Co Ltd v Post Office* [1957] 2 QB 352 at 360, [1957] 2 All ER 387 at 389. For the rejection of such a *dictum*, see *Public Trustee v IRC* [1960] AC 398, [1960] 1 All ER 1.

3 [1950] 1 KB 593 at 596, [1950] 1 All ER 290 at 291.

4 Megarry in a Note in (1944) 60 LQR 222.

5 *Hack v London Provident Society* (1883) 23 Ch D 103 at 112.

said that the first judgment remains binding[6]. The truth seems to be that in such a situation a later court has freedom to deal as it pleases with the earlier decision.

Refusal to follow

Before the doctrine of *stare decisis* came into being, judges freely refused to follow cases which they considered to be contrary to principle. A judge may even now refuse to follow a decision of co-ordinate authority, in which event the conflict awaits resolution by a superior tribunal. Repeated refusals to follow will weaken the authority of a case; as also the refusal by a higher court to adopt the rule enunciated by a lower court, but only if such refusal implies disapproval of it[7].

The growing volume of reported cases often leads to an unavoidable overlooking of relevant authorities. Sometimes, however, a precedent may be deliberately put on one side, though this is done rarely and perhaps as a last resort. Thus, Sellers LJ once said 'the best way to deal with that case is to say that it goes into the limbo of lost causes'[8].

Distinguishing

Repeated distinguishing of a case is evidence that the decision is not approved, and the effect may also be to confine it more and more closely to its own special facts.

It should be evident already that the bindingness in *stare decisis* is not rigid since judges have some latitude in evading unwelcome authorities[9]. All that the doctrine means is that a judge must follow a precedent except where he can *reasonably* distinguish it; but the possibilities of the latter are such that they reduce buidingness to the semblance of a cloud, solid looking and clear-cut when viewed from afar, but less so when one actually gets into it. A judge may, in the first place, restate the factual part of the precedent by lowering the level of generality in order to effect the necessary distinction. 'A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it':

6 *Curtis Moffat v Wheeler* [1929] 2 Ch 224. See also *The Parlement Belge* (1879) 4 PD 149, revsd on a different point (1880) 5 PD 197, but the ruling at first instance remains an authority; *Barratt v Gough-Thomas* [1945] 2 All ER 414, revsd on a different point [1945] 2 All ER 650, but the ruling at first instance was upheld in [1951] Ch 242, [1950] 2 All ER 1048. The rule in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293 remains an authority despite the fact that the decision was affd on a different point [1946] AC 163, [1946] 1 All ER 98.

7 *Dutton v Bognor Regis UDC* [1972] 1 QB 372 at 394, 401-402, [1972] 1 All ER 462 at 473, 478-479.

8 *Matthews v Kuwait Bechtel Corpn* [1959] 2 QB 57 at 69, [1959] 2 All ER 345 at 351. In *Herschtal v Stewart and Ardern Ltd* [1940] 1 KB 155, [1939] 4 All ER 123, Tucker J refused to follow *Dransfield v British Insulated Cables Ltd* [1937] 4 All ER 382, and ignored *Otto v Bolton and Norris* [1936] 2 KB 46, [1936] 1 All ER 960. In *Elias v Pasmore* [1934] 2 KB 164, Horridge J made no mention of the classic case of *Entick v Carrington* (1765) 19 State Tr 1029, though it had been cited to him.

9 Llewellyn listed sixteen distinguishing techniques and sixteen for providing a 'fresh start': *The Common Law Tradition, Deciding Appeals* pp 85-91.

so said Lord Halsbury[10], and his words are classic authority for this particular distinguishing technique. The two decisions then, as Lord Simon put it, are like 'binary stars each part of which lives within the field of the other and is essentially influenced by it'[11]. In this way it is theoretically possible to confine the authority of *Donoghue v Stevenson*[12] to the manufacture of ginger beer and to distinguish it from a case concerning the manufacture of fruit-salad; but it is obvious that the lengths to which this technique can be carried have to be regulated by common sense. A distinction has to be *reasonable*, else it will not satisfy the desire that justice should be done. Alternatively, a judge may restate the factual part of the precedent by treating as material such additional facts as will move it away from the case in hand[13]. Again, it is possible to evade a precedent by treating the less appropriate of alternative principles as its *ratio*. Or, the ruling hitherto regarded as being the *ratio* may be rejected as *dictum*. Asquith LJ once quoted the following remark: '"the rule is quite simple: if you agree with the other bloke you say it's part of the *ratio*; if you don't, you say it's *obiter dictum*, with the implication that he is a congenital idiot". And this may well, as a matter of pure psychological fact, have more underlying truth than we know, or care to avow'[14].

On occasions it may be difficult to decide whether a case has been overruled in a subsequent decision, or merely distinguished. Where the House of Lords, for example, has commented adversely on earlier decisions of inferior courts, there is often a great deal of discretion for future courts in deciding whether the House of Lords has by its comments destroyed the authority of those cases, or merely distinguished them and left their authority unimpaired[15].

Changed conditions

Although a case has neither been reversed nor overruled, it may cease to be 'law' owing to changed conditions and changed law: *cessante ratione cessat ipsa lex*. It is not easy to detect when such situations occur, for as long as the traditional theory prevails that judges never make law, but only declare it, two situations need to be carefully distinguished. One is where a case is rejected as being no longer law on the ground that it is now thought never to have represented the law[16]; the other is where a case, which is acknowledged to have been law at the time, has ceased to have that character owing

10 *Quinn v Leathem* [1901] AC 495 at 506. See also Lord Denning in *Close v Steel Co of Wales Ltd* [1962] AC 367 at 388, [1961] 2 All ER 953 at 960; Lord Upjohn in *Ogden Industries Pty Ltd v Lucas* [1969] 1 All ER 121 at 126. See, however, Lord Diplock in *D v NSPCC* [1978] AC 171 at 220, [1977] 1 All ER 589 at 596-597.

11 *FA & AB Ltd v Lupton (Inspector of Taxes)* [1972] AC 634 at 659, [1971] 3 All ER 948 at 965. In *Jones v Secretary of State for Social Services* [1972] AC 944, [1972] 1 All ER 145, the House of Lords refused to distinguish a previous case which the Court of Appeal and Divisional Court had held to be distinguishable.

12 [1932] AC 562.

13 Eg *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185 where the House of Lords distinguished a previous decision by stressing the materiality of a certain fact; and *The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709, where the Judicial Committee stressed one small fact so as to distinguish its own previous decision on the same occurrence.

14 Asquith 'Aspects of the Court of Appeal' (1950) 1 JSPTL(NS) 359.

15 *Consett Industrial and Provident Society Ltd v Consett Iron Co Ltd* [1922] 2 Ch 135.

16 Eg *R v Jackson* [1891] 1 QB 671, where, on the question of a husband's power to confine and chastise his wife, the case of *Re Cochrane* (1840) 8 Dowl 630, giving him such a power, was overruled as never having represented English law.

to altered circumstances. It is the latter that is under consideration. If the law-making function of courts is admitted, then it would be easy to reject out-of-date precedents openly on the ground of changed conditions and not have to resort to the threadbare fiction that cases only reflect what always has been law.

Willes CJ once said 'When the nature of things changes, the rules of law must change too'[17]. This is a truism in that the legislature and, within limits, the courts should change rules to keep the law abreast of change. The question under review is whether changed conditions may deprive a case of its law-quality. For instance, the decision of the Court of Appeal in *Re Polemis and Furness, Withy & Co Ltd*[18] was disapproved by the Privy Council in *The Wagon Mound*[19], but although it has never been overruled, it has been declared to be no longer law in the light of the change in the law of remoteness of damage that had taken place. There is also a strong suggestion in *The Heron II*[20] that *The Parana*[1], which had laid down a rule for assessing damages in the bygone days of sailing ships, had ceased to be law in the conditions of modern transport. When sterling changed from being a stable to a floating currency and after Britain's entry into the EEC, the Court of Appeal departed from the rule laid down by the House of Lords in an earlier case[2]. Later, in following their decision, Lord Denning MR remarked 'When the nature of sterling changes, the rule of law may change too'[3]. On appeal, the House of Lords affirmed the Court of Appeal and refused to follow their previous decision, but indicated that it was for the House, and not the Court of Appeal, to do so. The 'changed conditions' rule applies only to decisions which are not binding. In an important statement of the position Lord Simon said:

> 'To sum up on this part of the case: (1) the maxim in the form "cessante ratione cessat ipsa lex" reflects one of the considerations which your Lordships will weigh in deciding whether to overrule, by virtue of the 1966 declaration, a previous decision of your Lordships' House; (2) in relation to courts bound by the rule of precedent the maxim "cessante ratione cessat ipsa lex", in its literal and widest sense, is misleading and erroneous; (3) specifically, courts which are bound by the rule of precedent are not free to disregard an otherwise binding precedent on the ground that the reason which led to the formulation of the rule embodied in such precedent seems to the court to have lost cogency; (4) the maxim in reality reflects the process of legal reasoning whereby a previous authority is judicially distinguished or an exception is made to a principal legal rule; (5) an otherwise binding precedent or rule may, on proper analysis, be held to have been impliedly overruled by a subsequent decision of a higher court or impliedly abrogated by an Act of Parliament; but this

17 *Davies v Powell* (1737) Willes 46 at 51.

18 [1921] 3 KB 560.

19 [1961] AC 388, [1961] 1 All ER 404. If one accepts the view that courts only declare, but do not make, law, it is arguable that *Polemis* never did reflect the 'true' law.

20 [1966] 2 QB 695, [1966] 2 All ER 593; affd [1969] 1 AC 350, [1967] 3 All ER 686.

1 (1877) 2 PD 118. In *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749 the House of Lords took account of the changed attitude with regard to the relative sanctity of person and property and, in effect, treated a previous decision of itself on the nature of an occupier's duty as no longer law.

2 *Schorsch Meier GmbH v Hennin* [1975] QB 416, [1975] 1 All ER 152, not following *Re United Railways of the Havana and Regla Warehouses Ltd* [1961] AC 1007, [1960] 2 All ER 332.

3 *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487 at 504, [1975] 1 All ER 1076 at 1085.

doctrine is not accurately reflected by citation of the maxim "cessante ratione cessat ipsa lex"[4].

Overruling

This refers to the action of a superior court in upsetting the *ratio* laid down by a lower court in some other case. Reversal, which is the overthrow of a decision on appeal in the same case, may involve disapproval of the *ratio* as stated by the lower court; but it need not, as where the decision is reversed on some other point. Overruling necessarily involves disapproval of the *ratio*, but never affects the previous *decision* so that the parties in the overruled case continue to be bound by the decision under the doctrine of *res judicata*; and accounts that have been settled also are not affected[5]. A theoretical question arises when a superior court declares that a *ratio* enunciated previously by a lower court is wrong, but at the same time decides the present case with similar facts in the same way but for a different reason. If it is accepted that, whatever is held to constitute the *ratio decidendi* of a case, at least nothing can be *ratio* which does not support the order that is made, then the new ruling is *ratio*; but even if it is not, it may well prove to be so authoritative as to reduce the distinction between *ratio* and *dictum* to vanishing point[6]. If a case is overruled by statute, there is some ground for saying that its *ratio* is no longer authoritative[7]. A case may first be overruled and then reversed, as when the *ratio* is overthrown by superior authority in another case while there is still time within which to appeal in the first case, and an appeal is then lodged against the decision, which is duly reversed[8]. It is also possible for a case to be first reversed and then overruled, as when the decision is reversed on appeal on some other point without affecting the *ratio*, and the *ratio* is then overthrown in another case. If a case is overruled and the overruling case is itself reversed[9], or overruled[10], the first will revive. Statutory repeal operates prospectively, unless the statute itself provides otherwise. Suppose that case A is overruled by case B, which is itself subsequently overruled by statute. Does case A revive? By analogy with the case law position it is submitted that it does[11].

4 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 476, [1975] 3 All ER 801 at 820. In the light of this one wonders if *Re Polemis* [1921] 3 KB 560 is still binding on the Court of Appeal.

5 *Thomson v St Catharine's College, Cambridge* [1919] AC 468; *Re Waring, Westminster Bank v Burton-Butler* [1948] Ch 221, [1948] 1 All ER 257. Cf *Re Koenigsberg, Public Trustee v Koenigsberg* [1949] Ch 348, [1949] 1 All ER 804. Accounts settled: *Henderson v Folkestone Waterworks Co* (1885) 1 TLR 329.

6 This might have occurred in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, but here the order was in fact based on the new principle as formulated.

7 *Thomson v Moyse* [1961] AC 967 at 989, 1006, [1960] 3 All ER 684 at 688, 699.

8 *Ainley v Ainley* [1945] P 27, [1945] 1 All ER 265, overruled by *Beard v Beard* [1946] P 8, [1945] 2 All ER 306; revsd [1946] 1 All ER 311n.

9 *Watson Bros v Hornby* [1942] 2 All ER 506, overruled by the Court of Appeal in *Sharkey v Wernher* [1954] Ch 713, [1954] 2 All ER 753, revived by the House of Lords, which revsd the Court Appeal, [1956] AC 58, [1955] 3 All ER 493.

10 It was on this principle that Denning LJ revived *Cann v Willson* (1888) 39 ChD 39, in his dissenting judgment in *Candler v Crane, Christmas & Co* [1951] 2 KB 164, [1951] 1 All ER 426. The House of Lords agreed with him in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575.

11 Cf the restrictive interpretation of *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628, in *Davie v New Merton Board Mills Ltd* [1959] AC 604, [1959] 1 All ER 346, and the overruling of *Davie* by the Employer's Liability (Defective Equipment) Act 1969. The gist of the *Wilsons ratio* was re-stated in the statute, so the point did not arise. It is submitted that that *ratio* would have revived even apart from the Act.

It is not possible to lay down a rule as to when it is or is not permissible to overrule[12]. There will sometimes be a bold rejection even of settled doctrine[13]; at others there will be a timid refusal to eradicate obsolete and obstructive rules[14]. In *Jones v Secretary of State for Social Services*[15] the House of Lords considered whether or not to overrule a previous decision of its own. Various considerations were mentioned. In the first place, it was said to be important on grounds of public policy not to weaken certainty or finality. (a) Finality is necessary in developing the law; (b) a tenable view taken in case 1 should not be cast aside by an equally tenable opposite view in case 2, or this in turn may be cast aside in case 3; and (c) it is important not to encourage the re-opening of questions. Secondly, overruling is legitimate when broad issues of legal principle are involved, or if a decision has been disapproved, or distinguished on inadequate grounds. Thirdly, it is easier to overrule a recent decision before it has been acted on. Fourthly, overruling should rarely occur in matters of statutory construction according to two of their Lordships, but two others thought otherwise[16]. In the result, even though a majority of their Lordships thought the earlier case to have been wrongly decided, only a minority were prepared to overrule it[17].

Circumstances which might tend to strengthen the authority of a case and which would work against it being overruled are the unanimity of the court, the eminence of the judges who composed it, the approval of the decision in later cases and by the profession at large, the evidence in the report that the issue was fully and carefully argued by counsel and that the court took time to deliberate, and the length of time for which the decision has stood. This last is especially important since the longer a case has stood, the more people will have governed their transactions on the basis of what is thought to be law[18]. Similarly, factors which might make a court more ready to overrule

12 See the remarks of Lord Loreburn in *West Ham Union v Edmonton Union* [1908] AC 1 at 4.

13 Eg *Morgan v Fear* [1907] AC 425; *Bowman v Secular Society* [1917] AC 406; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122; *Holmes v DPP* [1946] AC 588, [1946] 2 All ER 124; *Public Trustee v IRC* [1960] AC 398, [1960] 1 All ER 1; *Button v DPP* [1966] AC 591, [1965] 3 All ER 587; *R v Bow Road Domestic Proceedings Court, ex p Adedigba* [1968] 2 QB 572, [1968] 2 All ER 89.

14 Eg *Foakes v Beer* (1884) 9 App Cas 605; *Admiralty Comrs v SS Amerika* [1917] AC 38; *Searle v Wallbank* [1947] AC 341, [1947] 1 All ER 12; *Westminster Bank v IRC* [1958] AC 210, [1957] 2 All ER 745.

15 [1972] AC 944, [1972] 1 All ER 145.

16 See, however, *Farrell v Alexander* [1977] AC 59, [1976] 2 All ER 721; *Vestey v IRC* [1980] AC 1148, [1979] 3 All ER 976.

17 In *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, the House of Lords had no doubt that the principle in *Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358 was outdated, and three judges thought it wrong. Yet there was some hesitation about overruling it formally, but a preference instead to interpret it in a way which deprives it of effect. This may be because the Privy Council only a few years previously had emphatically upheld it in *Railways Comr v Quinlan* [1964] AC 1054, [1964] 1 All ER 897. Nevertheless, *Herrington* has given the clearest hint that the *Addie-Quinlan* principle is no more. See also *The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148. J Stone thought that (1) the House of Lords should first determine what the law ought to be; (2) the precedent challenged should be measured against what it ought to be; and (3) if it falls short, the degree of shortfall should be weighed against the effect of departing from it, or, alternatively, the possibility of narrowing its *ratio* should be weighed against the evil of an over-refined distinction: 'On the Liberation of Appellate Judges—How not to do it!' (1972) 35 MLR 449.

18 Eg *The Annefield* [1971] P 168, [1971] 1 All ER 394 (construction on a commercial document, which had been acted on for fifty-six years, should not be upset). In *Knuller Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898, the House of Lords declined to overrule *Shaw v DPP*

an earlier case are a lack of unanimity in the judgments, the failure to take notice of relevant authorities, the lack of eminence of the judges who decided it, the fact that the report is of poor quality, the fact that the issue was not fought out fully but was compromised, the fact that the judgment was extempore and the matter had not been properly argued, the fact that the case has been doubted or criticised in subsequent decisions or by the profession or in commentaries of jurists, and, by no means least, if the decision is thought to be plainly wrong.

Overruling may be express or implied. It is implied when the *ratio* of the later decision of a superior court is inconsistent with that of the inferior court. In view of the difficulty of ascertaining the *ratio* of a case, it follows that it is equally difficult to decide whether a case has been impliedly overruled or not[19], but it does give courts a loophole for escaping from *stare decisis*.

The effect of overruling is retroactive except that it does not unsettle matters which are *res judicata* as between the parties to the overruled decision, and accounts which have been settled[20]. Retroactivity is logically reconcilable with the theory that judges do not make law but only declare what always has been law on the hypothesis that the overruled decision was an erroneous declaration of the law and hence void *ab initio*. This reason may be an *ex post facto* rationalisation. A more fundamental reason seems equally plausible, namely that just quality is inherent in every law. Therefore, an unjust (hence erroneous) precedent can never have been 'law'. However, the retroactive rule creates a difficulty. The House of Lords insists that only the House can declare its own decisions wrong and that lower courts must follow them. This implies that such previous decisions are 'law', albeit 'bad law', since no court can be bound to follow that which is not 'law'. If so, the overruling by the House of Lords of one of its own decisions must operate prospectively. On the other hand, all transactions entered into prior to the overruling are governed by the new decision. This differs from statute where repeal operates prospectively, unless there is express provision to the contrary. Everything that occurred prior to repeal remains governed by the repealed statute.

Even if it be conceded that judges do make law, the question of hardship would remain in that those who had acted in reliance on the law prevailing at the time would be judged on the basis of a different law made *ex post facto*. This consideration weighs powerfully against overruling except for compelling reasons. A suggestion that merits serious attention is that overruling, like repeal, should take effect for the future only, and that the decision in the instant case should abide by the previous law for the last time[1]. The

[1962] AC 220, [1961] 2 All ER 446, because the decision had been acted on in a great many cases since. Lord Reid, who had dissented in *Shaw* and still thought it to have been wrongly decided, refused to overrule it on grounds of certainty.

19 Eg *Leathley v John Fowler & Co Ltd* [1946] KB 579, [1946] 2 All ER 326. See also the effect on *Norris v Edmonton Corpn* [1957] 2 QB 564, [1957] 2 All ER 801 of *Francis v Yiewsley and West Drayton UDC* [1958] 1 QB 478, [1957] 3 All ER 529, as discussed in *Eastbourne Corpn v Fortes Ice Cream Parlour (1955) Ltd* [1958] 2 QB 41, [1958] 2 All ER 276 (revsd [1959] 2 QB 92, [1959] 2 All ER 102).

20 Blackstone *Commentaries* I, p 87; *Re Waring, Westminster Bank v Burton-Butler* [1948] Ch 221, [1948] 1 All ER 257; *Henderson v Folkestone Waterworks Co* (1885) 1 TLR 329.

1 Wigmore, Preface to *Science of Legal Method* p xxxviii. The doctrine has been applied in the United States: *Great Northern Rly v Sunburst Oil and Refining Co* 287 US 358 (1932); *Johnson v New Jersey* 384 US 719 at 733–735 (1966). The Indian Supreme Court in a bold and imaginative judgment showed readiness to hold a statute void prospectively: *Golak Nath v State of Punjab* [1967] 2 SCR 762. In *Jones v Secretary of State for Social Services* [1972] AC 944 at 1015, 1026–27, [1972] 1 All ER 145 at 189, 198–199, Lords Diplock and Simon thought

objections do not appear to be conclusive. It might be said that if the new rule, which is to supplant the old, does not support the actual decision it can only be a *dictum*. This might be countered by the argument that the tribunal is only freeing itself for the *future* from any constraining effect of its own decision, thus enabling itself to adopt the *dictum* later. It might also be objected that a litigant would not be encouraged to appeal against a bad precedent if the overruling of it would not avail him. There is probably some substance in this in a limited number of cases, but against it there is a possible advantage in that the new practice should remove the inhibiting factor which often stands in the way of much-needed reform. Besides, the objection would be met by coupling prospective overruling with a discretion to overrule for the future and for the instant case, or for the future only, or for the future, the instant case and retrospectively. Prospective overruling will be helpful where the object is to create a new criminal offence, or extend an existing one, by overruling a case which had held that there is no liability in that situation; for this would avoid having to punish the accused in the instant case for conduct which was not a crime when he did it[2].

Following and applying

The *ratio decidendi* of a previous case may be followed or applied in a subsequent case. If a case has been repeatedly followed, this is a factor which enhances its authority. A case may be said to be 'followed' when the use made of it does not affect its *ratio*, for example, when the judge only trims the facts of the case before him to fit it into the precedent. A case may be said to be 'applied' when the use made of it does affect its *ratio*, which could occur when the judge raises the level of its generality by reducing the material facts, or selects the more appropriate of alternative *rationes*. He may also adopt a *dictum* in it as the *ratio* of the case before him[3].

Explaining

A judge may place a certain interpretation on a precedent and he may then follow it, or he may refuse to follow it, or he may distinguish it. Explaining is an indication that the *ratio decidendi* is being reshaped.

JUDICIAL DISCRETION

Since there is no fixed *ratio* of a case, there is an element of choice in determining it. The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been law[4]. This doctrine is

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that prospective overruling should be considered; and see Lord Simon's 'Afterword' in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 490, [1975] 3 All ER 801 at 832. Contra Lord Devlin 'Judges and Lawmakers' (1976) 39 MLR at 11. See also Traynor '*Quo Vadis*, Prospective Overruling: a Question of Judicial Responsibility' (Birmingham University 1975).

2 See on this Friedmann 'Limits of Judicial Lawmaking and Prospective Overruling' (1966) 29 MLR 593.

3 Llewellyn listed thirty-two techniques of following and applying: *The Common Law Tradition, Deciding Appeals* pp 77-84.

4 *Blackstone* I pp 88-89. See also Hale *History of the Common Law* p 90; Lord Esher in *Willis v Baddely* [1892] 2 QB 324 at 326; Viscount Dilhorne in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1045, 1051, [1970] 2 All ER 294 at 313, 318; and in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1107, [1972] 1 All ER 801 at 854.

the product of many factors. It would appear to result from thinking exclusively in the present time-frame, which gives rise to the belief that there must be some rule which is always 'there' at any given moment and waiting to be applied. In Blackstone's day another important foundation for the doctrine was the belief in natural law, which was supposed to be part of English law. Despite the derision which this theory encountered[5], and in the face of evidence to the contrary, its vitality is remarkable. Again, during the seventeenth-century struggle against the prerogative the judges maintained that the king was subject to the law and could not legislate, the corollary of which was that they, too, were subject to the law and unable to make law and bound only to apply it. The doctrine of the separation of powers also insisted upon the theoretical dissociation of judicial and legislative functions. The climate of opinion in the nineteenth century was favourable to the theory in so far as the prevailing positivism concerned itself only with the law as found, whether thought to have been produced by custom or laid down by sovereign authority. Also, public confidence is more easily retained by fostering the illusion that judges do but administer the law impersonally and that none of them can make the rules, especially since judicial law-making is necessarily retroactive. The theory is also borne out in the simplest disputes, particularly those in lower tribunals, which constitute the bulk of litigation. Judges, for their part, seek refuge in the theory when giving a harsh decision. Indeed, it has even been suggested that the theory satisfies the psychological preference of human beings to be led rather than have to find their own way, the need, in short, for a 'father-symbol'. Another factor is that judicial decisions in their nature have to pronounce on the legality of conduct after it has taken place[6]. Anything savouring of attainder is unpopular and the orthodox theory conceals this suggestion under the pretence that the law has always been there. It should also be noted that, whether or not a creative element enters into a particular decision, it becomes for future purposes evidence of what the law is, and this evidential function overlays the creative factors that operated to bring it into being.

Finally, and by no means least, the orthodox theory finds support in the syllogistic form of reasoning by which the conclusion is ultimately reached. For a syllogism requires that the premises, from which the conclusion is deduced, should already be in existence. Thus: 'All men are mortal' (major premise); 'X is a man' (minor premise); 'Therefore X is mortal' (conclusion). In a judgment the syllogism assumes the following form: 'Facts of Type A are governed by Rule B, (major premise); 'Facts of the instant case are of Type A' (minor premise); 'therefore the facts of the instant case are governed by Rule B', (conclusion)[7]. A syllogism can only make explicit that which is implicit in the premises; it neither creates nor reveals anything new. With reference to a judicial decision this gives rise to the idea that the result is deducible from a rule, which is already 'there'[8].

The syllogistic form appears only in the way the conclusion is stated at

5 Austin *Jurisprudence* II p634, who called it 'the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges'.

6 Cf Bentham *Works* V, p235, who called it 'dog law'.

7 Summarised by Lord Simon in *FA and AB Ltd v Lupton (Inspector of Taxes)* [1972] AC 634 at 658–659, [1971] 3 All ER 948 at 964.

8 See MacCormick *Legal Reasoning and Legal Theory*; Aarnio *On Legal Reasoning*.

the end of a judgment. Before a judge can deduce his conclusion, however, he has to find, and sometimes make, suitable premises and there is flexibility at every stage of the decisional process. First, he has to establish the major premise that 'Facts of Type A are governed by Rule B' by finding it in a precedent, statute or custom; or, if not, he creates one by analogy with other rules or by a process akin to induction or, in the absence of any other guide, he creates one out of his own sense of justice. When there is a rule of precedent, he has to consider whether or not to follow it either because it is binding and is not reasonably distinguishable, or, if not binding, because it is consonant with his sense of justice.

Next, he has to establish the minor premise that 'Facts of the instant case are of Type A'. Every case begins with the facts, but the finding of facts depends on opinion as to the credibility of witnesses and interpretation of the evidence generally. The facts have then to be stated at an appropriate level of generality and the statement is governed by linguistic conventions. It may also be coloured by a convenient rule which is to hand. The rule-statement, too, for its part is often trimmed according to the view taken of the facts so that it can be made to yield the conclusion which the judge wants to reach. The formulation of fact-statements and rule-statements are parallel processes.

In establishing that the facts of the instant case are of Type A, a distinction to be borne in mind is that between 'similarity' and 'identity'. It is unlikely that the factual part of a rule will be identical with the facts of the instant case because the chance of identity between facts in different situations occurring at different times is inconceivably remote and because rules are stated in general terms so as to accommodate variations and often utilise vague concepts, such as 'negligence', and 'possession'. As will be seen later, these have no fixed content and can be given different meanings in different contexts. What is crucial, therefore, is the perception of similarity, not identity, between the fact-situation of the case and the fact part of the rule; which is subjective, since perception of similarities and dissimilarities is a matter of choice and a desire to reach a just decision[9].

Finally, there is the conclusion that 'The facts of the instant case are governed by Rule B. Once the major and minor premises have been manipulated so as to show that the fact-statement in the instant case is similar to that of the rule, the conclusion will appear to follow syllogistically. The judicial process thus stands in a class of its own; it involves different kinds of reasoning.

A INDUCTION. This applies to finding a major premise. The term 'induction' is not a happy one but will serve for want of a better. The process bears only a broad parallel to scientific induction in so far as it proceeds from instances of particular cases to a generalised rule. 'Facts of case A were decided Y'; 'Facts of case B were decided Y'; 'Therefore, strictly, facts A and B should be decided Y'. It may, however, be reasonable to extract a broader proposition capable of yielding decision Y in situation C (and perhaps D and E)

9 See eg the extension of 'cattle' in the old cattle-trespass rule. Dogs were not similar to cattle for the purpose of this rule, but they were similar for the purpose of the rule (since abolished) of non-liability for straying on the highway: *Ellis v Johnston* [1963] 2 QB 8, [1963] 1 All ER 286. Cf *Upton-on-Severn RDC v Powell* [1942] 1 All ER 220. See also MR Cohen 'Law and Scientific Method' in *Jurisprudence in Action* pp 125-126.

as well[10]. Any such broader proposition has to be reasonably warranted by the material out of which it was extracted, or it is liable to be cut down as being too wide by a later court[11].

There are differences between this type of reasoning and scientific induction:

(a) A scientist can repeat his experiment and verify his principle; a judge cannot.
(b) Scientific principles result from observations of data; judicial principles result from statements of fact and value-judgments.
(c) A judge can reason by analogy and choose between competing analogies; a scientist does not.
(d) A scientific principle has to be modified so as to accommodate new data; judicial principles are modified in response to moral and policy considerations.
(e) A judge induces a principle in order to decide the case before him; for a scientist the case before him is part of the data out of which the principle is drawn, or by which it is tested[12].
(f) A scientist must accommodate all the data and has no choice; a judge can select his material by discarding unwelcome cases.

B ANALOGY. This applies to finding the minor premise. The reasoning proceeds case-by-case and by means of contrasting examples, first one way and then another to see which way one's judgment is swayed. In this way the scope of the 'facts' contained in the major premise is widened so that it can accommodate a new set of facts[13]. Professor Wisdom expressed it best when he said:

> 'It is a presenting and re-presenting of those features of the case which *severally co-operate* in favour of the conclusion, in favour of saying what the reasoner wishes said, in favour of calling the situation by the name by which he wishes to call it. The reasons are like the legs of a chair, not the links of a chain'[14].

Analogical reasoning accommodates change with certainty painlessly and is, therefore, popular in the common law. The pressure exerted by the need for certainty in law is a powerful incentive to develop the law analogically when possible. It also helps to preserve confidence by abiding within existing

10 See Lord Asquith in *Chapman v Chapman* [1954] AC 429 at 470, [1954] 1 All ER 798 at 819; Lord Denning MR in *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 at 313, [1968] 1 All ER 229 at 236; and in *The Changing Law* p 50. See also Cardozo *The Nature of the Judicial Process* p 23.

11 Cf the treatment of Lord Atkin's speech in *Donoghue v Stevenson* [1932] AC 562, by Asquith and Denning LJJ in *Candler v Crane, Christmas & Co* [1951] 2 KB 164, [1951] 1 All ER 426. See also Jenkins LJ in *Re Ulverstone and District New Hospital Building Fund, Birkett v Barrow and Furness Hospital Management Committee* [1956] 2 Ch 622 at 641, [1956] 3 All ER 164 at 174–175; *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185 (rejecting *Pritchard v Post Office* (1950) 114 JP 370 as being too widely stated).

12 Dickinson 'Legal Rules and their Function in the Process of Decision' (1931) 79 U Pa LR 833.

13 Lord Simon in *FA and AB Ltd v Lupton (Inspector of Taxes)* [1972] AC 634 at 659, [1971] 3 All ER 948 at 965.

14 'Gods' in *Philosophy and Psycho-Analysis* pp 157–158, 248–254. See also Cohen 'Law and Scientific-Method' in *Jurisprudence in Action* pp 125–126; Bracton *De Legibus* f 1(b); Parke B in *Mirehouse v Rennell* (1833) 1 Cl & Fin 527 at 546; Roxburgh J in *Re House Property and Investment Co Ltd* [1954] Ch 576 at 601, [1953] 2 All ER 1525 at 1536.

authority. The case-by-case method is thus a way of making one's own sense of justice plausible.

C JUSTIFICATION The judge reaches a provisional conclusion and then tries to find authority to support it. The provisional conclusion may be the result of his trained instinct, or his opinion as to the merits of the dispute, or his sense of public need and social expediency; and he interprets and manipulates his authorities so as to justify that conclusion in a publicly satisfying way[15]. The 'public' for this purpose includes not only those charged with applying and administering the decision, but also all those interested in and affected by its application, which varies with the kind of rule[16]. Distinguishing depends on *plausibly* stating the facts of the instant case differently from the factual part of the rule that is being distinguished, or *plausibly* restating the rule so as to move it away from the instant case. Such techniques call for considerable skill and experience in handling authority. As Lord Wright once said 'A good judge is one who is the master, not the slave, of the cases'[17]. MacKinnon LJ also gave a pointed hint when he said

> 'So far as I am concerned, I freely avow that, inasmuch as in common-sense and decency Mr Heap ought to be able to recover against somebody, and in the circumstances of this case and having regard to the correspondence which has taken place, in common-sense and decency he ought to recover against these defendants if the law allows, my only concern is to see whether upon the cases the law does allow him so to recover. I think that it does'[18].

Viscount Radcliffe began a speech by speculating on the merits of a particular conclusion before considering what support it had in law.

> 'My Lords, it sometimes helps to assess the merits of a decision, if one starts by noticing its results and only after doing that allots to it the legal principles upon which it is said to depend.' (Having done that, he proceeded) 'I start, then, with the assumption that something must have gone wrong in the application of legal principles that produce such a result'[19].

A well-known ploy in this type of reasoning is for a judge to set out one line of argument leading to a certain conclusion, and then to set out a different line of argument also leading to the same conclusion[20]. They are alternative justifications.

Although all these methods play important parts in judicial reasoning, the first two types are frequently pressed into the service of the last[1]. Thus, induction can be much influenced by the conclusion which the judge may

15 Dewey 'Logical Method and Law' (1924) 10 Cornell LQ 17. 'The decision is a matter of outlook and impression rather than one for logical argument': per Porter J in *Philadelphia National Bank v Price* [1937] 3 All ER 391 at 397.

16 They may be sections of the community, eg motorists or trade or pressure groups, such as the National Council for Civil Liberties. The need for the judicial process to retain confidence was stressed by the Privy Council in *Geelong Harbor Trust Comrs v Gibbs Bright & Co* [1974] AC 810, [1974] 2 WLR 507.

17 Wright *Legal Essays and Addresses* p 79.

18 *Heap v Ind Coope and Allsop Ltd* [1940] 2 KB 476 at 483, [1940] 3 All ER 634 at 636-637.

19 *ICI Ltd v Shatwell* [1965] AC 656 at 675-676, [1964] 2 All ER 999 at 1005-1006. See also Lord Radcliffe *The Law and its Compass*.

20 Eg Denning LJ's judgment in *Broom v Morgan* [1953] 1 QB 597 at 609-610, [1953] 1 All ER 849 at 854-855.

1 For an examination of reasoning, see Lord Diplock in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1058 et seq, [1970] 2 All ER 294 at 324 et seq.

want to reach. In scientific induction *all* the facts have to be accommodated in the rule, whereas in law the judge can and does get rid of inconvenient precedents by distinguishing them. In this way he *selects* the material out of which to induce a rule and can thereby bend legal development in a certain direction.

The case-by-case method likewise lends itself to finding justification for a provisional conclusion. The perception of similarities is a matter of choice. Cases are not labelled 'similar' or 'dissimilar'; they can be made to appear similar or dissimilar according to the way in which they are presented[2]. The words of Professor Wisdom, quoted earlier, are worth repeating. The process, he said, is a presenting and re-presenting of those features of a case which co-operate 'in favour of saying what *the reasoner wishes said*, in favour of calling the situation by the name by which *he wishes to call it*'[3].

It is clear, therefore, that analogy can be pressed into the service of justification, but a caution needs to be uttered in case an exaggerated impression is created. Judges, like all human beings, prefer to avoid having to make personal decisions[4] and they are very much aware of the need for consistency, which is an important dictate of justice. The position may be put as follows. If a judge has no strong feelings in the matter, and the resemblances thrown up by the case-by-case method are obvious, these are likely to exercise a compelling influence. Even where the resemblances are not obvious, different ways of presenting the material may still help to sway the beam of judgment by weighting the similarities one way rather than another[5]. It should not be forgotten, however, that similarities are creations of the mind, not something given, and that some element of choice, perhaps imperceptible, underlies the application of every rule.

If a judge has strong feelings, then, however obvious the resemblances may be the other way, he will contrive, as far as he can reasonably do so, to manipulate the authorities to suit the decision he wants to give. 'If I thought that injustice had been done to him', said Lindley LJ 'I should have found some method, I have no doubt, of getting rid of the technical objection'[6]. Lord Denning, too, made a similar remark: 'I confess that I should do my best to distinguish it in some way if I was quite satisfied that it was wrong'[7]. A candid avowal of judicial technique came from Lord Diplock:

> 'Yet all nine judges who have been concerned with the instant case in its various stages are convinced that the plaintiff's claim ought to succeed; and if I may be permitted to be candid, are determined that it shall. The problem of judicial technique is how best to surmount or to circumvent the obstacle presented by the speeches of the Lord Chancellor and Viscount Dunedin in *Addie's* case, and the way in which those speeches were dealt with in the Privy Council in the comparatively recent Australian appeal of *Railways Comr v Quinlan*'[8].

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2 See p 153 ante.

3 See p 154 ante (italics added). See also p 183 note 9 ante.

4 Wright 'Precedents' (1943) 8 CLJ 144; Goodhart *Essays in Jurisprudence and the Common Law* ch 13.

5 Decisions as to whether a servant acted in the course of employment are an outstanding example.

6 *Re Scowby, Scowby v Scowby* [1897] 1 Ch 741 at 751.

7 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 487, [1962] 1 All ER 1 at 19.

8 *British Railways Board v Herrington* [1972] AC 877 at 931, [1972] 1 All ER 749 at 787. The case is an example of different judicial techniques to arrive at the same result. The Court of Appeal, which was bound by a House of Lords decision that a trespasser can only recover

These statements should not be misunderstood to imply that bindingness is illusory and that judges decide as they please. To say that the doctrine is not rigid does not mean that it is non-existent. There are many pressures on judges to keep within the law, so their ability to manipulate rules is limited, and whenever they do so, their interpretations have to be reasonable and plausible. Far from being always free to decide as they please, they frequently confess that they are compelled by authority to decide in a certain way, even against their own inclinations.

When there is no rule of law

When there is no rule of precedent, statute or custom, knowing the law requires knowing how to create a rule. This may be done by the process akin to induction, which has been explained, or, failing all else, a judge may simply create a rule out of broad principle or doctrine, eg the fault principle or the maxims of equity, or out of his own sense of justice. In *Sommersett's Case*[9] the question arose for the first time whether English law should countenance slavery. There was no authority and counsel on both sides resorted to current philosophy in their arguments. Lord Mansfield made short work of the matter and declared that the slave should go free. In *Wilson v Glossop*[10] a husband turned his wife out of doors and she pledged his credit for the necessaries of life. When he sought to evade liability, the Court of Appeal held him liable on grounds of justice. If there had been no rule to that effect until then, there was one from then on. In *Corbett v Corbett* (*otherwise Ashley*)[11] an English court had to address itself for the first time to the question, What is a 'woman'? when a person, who had undergone a sex-change operation converting himself into an apparent female, went through a ceremony of marriage. Part of the judgment consists of a biological exposition of male and female organisms, the rest deals with the purpose and function of marriage. In the result the judge held the marriage to be void, since the person in question was still a biological male.

A study of the judicial process, its reasonings and techniques, helps to assess the significance of a case. Where there is an existing rule, a judge may do any one of several things.

(a) He may find complete similarity between the facts of the case before him and those contemplated by the rule. Not only is such a situation rare, but as a precedent the decision in such a case is, in any event, valueless.

(b) The statement of facts in the rule may be sufficiently general to cover the more specific facts of the instant case. A rule which contemplates, for example, the fact of 'negligence' will cover a multitudinous variety of situations. The decision in the instant case is then only illustrative.

(c) If the facts of the case before him differ from those stated in the rule, he may ignore the differences so as to be able to make a statement of

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in respect of intentional or reckless injury, deplored the narrowness of the rule but interpreted the facts as amounting to recklessness so as to give the trespasser a remedy. The House of Lords interpreted the facts as amounting to negligence only, but upheld the Court of Appeal by utilising its power not to follow its own previous decision.

9 (1772) 20 State Tr 1.

10 (1888) 20 QBD 354.

11 [1971] P 83, [1970] 2 All ER

fact which will fit into the rule. Since this does not affect the rule, the decision is again only illustrative.

(d) He may also, in the last situation, reinterpret the statement of facts of the rule so as to extract a sufficient measure of resemblance to the case in hand. Such reinterpretation will vary the scope of the rule and the decision is important because it thereby alters the rule.

(e) Notwithstanding a difference between the statement of facts in the rule and in the case, he may apply the rule. The decision is again important because it has extended the rule to cover new facts.

(f) If he dislikes the rule he may distinguish it on account of some difference in the statement of facts in the case before him. Such a distinction does not affect the rule; it means only that the rule has not been extended. The importance, if any, of such a decision will rest on other factors.

(g) He may create a distinction by lowering the level of generality at which the facts in the rule are stated. Such a decision is again important because it has narrowed the rule.

(h) He may deny the rule the dignity of 'law' by interpreting it as an *obiter dictum*. Such an interpretation is important for it has, in effect, unmade law.

(i) In appropriate circumstances he may destroy the rule directly by reversing or overruling it.

(j) He may select one of alternative or conflicting rules[12]. Such a case is important in that it settles a point previously uncertain.

(k) Where there is no existing rule, he has to find one, and a creative decision of this kind is of the highest importance.

FACTORS THAT KEEP *STARE DECISIS* IN BEING

The reasons why *stare decisis* continues to be a criterion of validity are not the same as those which brought about its acceptance, though some do continue to play their part. The factors may be listed as the ethos of the profession, more doubtfully the continued absence of a code, and continued service of the requirements of justice. These, it will be noticed, are moral, sociological and practical requirements, and essential to the continuance of *stare decisis*. This is not to imply that an unjust or inconvenient precedent is not 'law' *here and now*; the point is that injustice or inconvenience will *in time* kill it and, if this were to occur on a large enough scale, may even bring about the demise of *stare decisis* itself.

Professional ethos

Every specialist vocation evolves its own expertise and habits of thought, ie a way of going about the job[13]. It has been pointed out how, because of the absence of a code from the earliest days, lawyers were compelled to seek guidance in precedents and to distil principles from lines of decisions. This became so much the lawyers' way of thinking that it should now be regarded

12 Eg *Thorne v Motor Trade Association* [1937] AC 797, [1937] 3 All ER 157; *Armstrong v Strain* [1951] 1 TLR 856; (affd [1952] 1 KB 232, [1952] 1 All ER 139).

13 See Llewellyn *The Common Law Tradition. Deciding Appeals* pp 19, 21–23.

as one of the most influential factors in keeping *stare decisis* alive. The thinking habits of centuries as well as the individual perfecting of this craft over a lifetime make it difficult, if not impossible, for most lawyers to think in any other way[14].

Absence of a code

The lack of a code was an important factor in bringing *stare decisis* about, but what part this still plays is doubtful. Even if the common law were to be codified now, this would not dispel the ingrained habits of thinking of the profession and, moreover, there is no reason why *stare decisis* could not flourish under a code. The two are not incompatible, but complementary. The kind of code one has in mind would enunciate only the broad principles and what it would gain by way of economy of wording it would lose in detail[15]. In the result, numberless decisions will mushroom forth to fill in the outlines, which will lead to a system of case-law hardly distinguishable from *stare decisis*—as Continental experience has shown[16]. Therefore, where, as in Great Britain, *stare decisis* is the accepted practice, the introduction of a code is unlikely to produce a significant change in outlook[17].

Continued service of justice

The need to continue treating like cases alike and so achieving equality, consistency and impartiality remains constant. It may be argued that the broad doctrine of precedent achieves all this no less than *stare decisis*. So a better way to put it is this: while failure to satisfy the needs of equality, consistency and impartiality will be fatal to *stare decisis*, fulfilment does not of itself account for its continuance. The other factors that have just been considered are responsible for this. In view of this, it will be useful to compare briefly the working of *stare decisis* and its Continental counterpart.

Equality of treatment, consistency and impartiality are bound up with the need for certainty and predictability. Complete certainty and predictability are elusive goals, for if law is to develop at all, uncertainties are bound to arise and, moreover, it may not be the rule that is uncertain, but which of competing rules should apply. So far as certainty can be achieved at all, there is no reason why precedent in the broad sense may not succeed as well as *stare decisis*. On the contrary, *stare decisis* is in some danger of making certainty in law become certainty of injustice. For a binding authority, however erroneous, has to be followed unless it can be distinguished, and a tenuous distinction to avoid an unwelcome precedent is not the happiest alternative. Again, it is important that there should be uniformity of treatment for all; but this, too, can be achieved without *stare decisis*. There should also be some limit to litigation, and if by this is meant that repeated agitation of a point that has once been determined should be discouraged, then, as the Continental experience has shown, it can be achieved as successfully

14 This may be why lawyers are thought to develop personality traits that favour the *status quo*, on which see Weyrauch *The Personality of Lawyers passim*. Cf Shklar *Legalism passim*, for a call to lawyers to abandon their specialist outlook.

15 Silving *Sources of Law* pp 84–86.

16 Eg in France.

17 Cf the *Note* (*Judicial Precedent*) [1966] 3 All ER 77, [1966] 1 WLR 1234, which suggests that the practical effect of the House of Lords' refusal to bind itself is likely to be small.

without *stare decisis* as with it. No judge departs from previous decisions except for compelling reasons, and legal advisers do not encourage vain hopes in their clients. If a decision is clearly erroneous, an attempt will probably be made to get it overruled; which happens here as elsewhere. Finally, it is desirable not to discount the experience of the past, but this is of limited value. It cannot avail in cases *primae impressionis* and it may also be that such wisdom is out-dated. In so far as past wisdom should be preserved, both precedent and *stare decisis* seem equally apt for this purpose. Summing up one might say that *stare decisis* does not seem to fulfil the requirements of justice any better than the doctrine of precedent. There is, however, another way of regarding the matter. It is because the things that *stare decisis* and precedent can accomplish are desirable that the two doctrines have now moved so near to each other as to be barely distinguishable.

One of the most important aspects of continued justice is that *stare decisis* should be adaptable to changing needs. This requires the avoidance of inconvenience and technicality and, above all, functioning flexibility.

Avoidance of inconvenience and technicality

A practical drawback is the growing number of reported decisions, which may reach such proportions as to make *stare decisis* physically unworkable. The chances of relevant authorities being overlooked increases and this strikes at the roots of the doctrine, for a decision can hardly be treated as authoritative if it was given *per incuriam*. Digests of cases and comparable services are just about able to make the system work, but these may become inadequate in time. It might be possible to make less use of the decisions of judges sitting alone, or to have one opinion only in all appellate courts; and in order to avoid encumbering the court house the use of looseleaf reports has been advocated. The possibilities of computerised storage of decisions opens up new vistas altogether, but these are beset with other difficulties and will be discussed later[18]. A different objection to *stare decisis* is that in this overwhelming mass of cases there is the danger of losing sight of principle. This may well be, but it can be minimised to some extent by the work of legal authors whose business it is to expound and illuminate principle. It is also maintained that case law based on *stare decisis* is inconveniently slow in adapting itself to a rapidly changing society. However, rapidity of change depends, not on the system, but on the judges who work it. The charge had more substance as long as the House of Lords was bound, in effect, even by its own mistakes, but now that that rule has gone, the position has been eased and might become easier still if the Court of Appeal, too, refuses to be bound by itself.

Allied to the above is the inconvenience caused by the growing technicality of an ever increasing multitude of rules and sub-rules and exceptions, which was castigated by Tennyson as 'that wilderness of single instances'. The common law possesses, however, the remarkable faculty of self-simplification, which from time to time saves *stare decisis* from collapsing under its own weight. This ability to slough off the top-heavy overgrowth and to start budding afresh has given it much of its resilience. Sometimes a single broad principle is drawn out of a number of precedents, thereby relegating them to the category of mere illustrations, an outstanding instance of which was Lord

18 See pp 307–308 post.

Atkin's review of a large number of authorities in *Donoghue v Stevenson*[19], and his formulation from them of a rule of liability for negligence of epoch-making significance. Again, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[20] the House of Lords fused a number of diverse exceptions to the rule of non-liability for careless mis-statements[1] into a rule of liability for such statements[2].

Negligence, which is the branch of law in which decisions proliferate more rapidly perhaps than in any other, provides other examples of self-simplification. For instance, if the hosts of decisions as to whether a defendant's conduct was or was not careless were treated as laying down rules of law as to what does and does not constitute carelessness, the resulting state of affairs would be unthinkable. There has been an increasing tendency of recent years for courts not to treat such cases as 'law', but simply as illustrations of the rule that if a person causes damage carelessly he is liable, if he has not been careless he is not liable. 'The basic rule' said Pearson J 'is that negligence consists in doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done in that situation, and I approach with scepticism any suggestion that there is any other rule of law properly so called in any of these cases'[3].

Notwithstanding these tendencies, negligence is still over-complex. 'There is no room today for mystique in the law of negligence' said Diplock LJ[4], but the rules relating eg to 'foreseeability of harm' are of such artificiality and technicality as to belie that remark[5]. Obviously, courts do not indulge in artificialities for their own sake; what they strive to do is to give fair decisions in particular cases, and it is *stare decisis* that produces the complications. Just as considerations such as the degree of likelihood of injury, cost and practicability of measures to avoid it, the end to be achieved, and so forth, are regarded only as helpful guidelines in determining whether a defendant has acted carelessly or not, might not the foreseeability rules of today similarly become guidelines for applying tomorrow's principle that in cases of negligence liability shall be attributed according as the court deems just[6]? Such a development would be in keeping with the genius of the common law.

19 [1932] AC 562.

20 [1964] AC 465, [1963] 2 All ER 575.

1 Originating in *Derry v Peek* (1889) 14 App Cas 337.

2 Where such a principle has been constructed, it is unnecessary to cite illustrative cases, per Lord Diplock in *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225 at 274-275, [1981] 1 All ER 1185 at 1189-1190.

3 *Hazell v British Transport Commission* [1958] 1 All ER 116 at 118, [1958] 1 WLR 169 at 171. In three cases the House of Lords expressly declared that decisions on what constitutes carelessness should not be treated as laying down rules of law: *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at 755, [1959] 2 All ER 38 at 42 per Lord Keith, and at 757, 758, and at 43, 44 per Lord Somervell; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 at 163-164, [1959] 2 All ER 745 at 751, per Lord Keith; *Brown v Rolls-Royce Ltd* [1960] 1 All ER 577 at 581, [1960] 1 WLR 210 at 214 per Lord Keith, and at 582 and at 214 per Lord Denning.

4 *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518 at 531, [1964] 1 All ER 98 at 103.

5 Cf eg *The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, with *The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709. For the difficulties of the foreseeability test generally, see *Clerk & Lindsell on Torts* ch 11.

6 Cf *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 397, [1972] 1 All ER 462 at 475; *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 at 37, [1973] 3 All ER 557 at 562-563.

Similar to the complexity in negligence is the 'course of employment' doctrine in vicarious liability. The only rule of law here should be the broad and simple one that if a servant commits a tort while acting within the course of his employment, his master is answerable, but that if he was acting outside it, his master is not answerable. The question whether a servant was within or outside the course of employment, like the question whether a person was careless or not, is one of fact; to reduce it to rules of law governing types of situations is to reduce it to chaos. The sensible attitude has prevailed with regard to the question of carelessness; why not here? The opinion is ventured that it is perhaps writers of textbooks, rather than judges, who have been responsible for undue technicality by trying to evolve rules of law. The judges themselves do not appear to be obsessed in this way, for, as Finnemore J once said: 'The answer to a lot of the arguments on both sides in this case is, I think, as it so often is in the law of this country, that there is no one test which is conclusive or exhaustive or exclusive by which this particular problem can be solved'[7]. It is not easy to gauge how far this remark represents the judicial attitude as a whole, but even if it does not, it may well be a pointer in the direction of future simplification.

CONCLUSIONS

1. Judges do make law. A scrutiny of the judicial process shows that the Blackstonian doctrine is unacceptable. It fails to explain how the common law and certainly equity have grown[8]. No judge may refuse to give a decision. If no rule is at hand, he invents one. 'It may be' said Lord Denning MR 'that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better'[9]. In such a situation declaring what the law is and what it ought to be amount to the same[10]. More usually a judge narrows, extends, or otherwise modifies some existing rule, but all rules, whether created or adapted, are subject to modification in their turn. The *ratio* of a case may be likened to a pellet of clay, which a potter can stretch and shape within limits. If he wants to stretch it, he can; or he can press it back into a pellet. A *ratio* cannot be stretched indefinitely any more than clay, for there is a limit beyond which the generalisation of the statement of specific facts cannot go. When an unmanageable number of

7 *Staton v National Coal Board* [1957] 2 All ER 667 at 669 [1957] 1 WLR 893 at 895. Cf Asquith LJ 'I am not unaware that a prohibition has been held in some cases not to curtail the scope of employment, as in *Limpus v London General Omnibus Co* (1862) 1 H & C 526, but I think it does so in this case': *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266 at 276, [1951] 1 All ER 363 at 367.

8 Mellish LJ in *Allen v Jackson* (1875) 1 Ch D 399 at 409; Jessel MR in *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 Ch D 696 at 710. A new doctrine, the 'deserted wife's equity', was created in 1952 (*Bendall v McWhirter* [1952] 2 QB 466, [1952] 1 All ER 1307); but this was overthrown by the House of Lords thirteen years later (*National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472).

9 *A-G v Butterworth* [1963] 1 QB 696 at 719, [1962] 3 All ER 326 at 329. For examination of judicial creativity, see Lord Diplock in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1058 et seq, [1970] 2 All ER 294 at 324 et seq; Lord Hailsham in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1075, [1972] 1 All ER 801 at 827. See also the examples given on p 157 ante.

10 So Sir Garfield Barwick CJ in *Mutual Life and Citizens Assurance Co v Evatt* (1968) 42 ALJR 316 at 318 (quoted on p 333 post).

pellets accumulate, they may be gathered together and rolled into a single big pellet; and the moulding process begins anew. The analogy also holds in one further respect. The longer a decision has stood, the more brittle and less malleable does it become; it then has to be accepted as it stands or destroyed.

The line between creation and adaptation is a thin one, and the fact that judges do make law has been avowed by judges as well as writers. There is, however, a difference between judicial and legislative creativity. Allen put the matter thus:

> 'the creative power of the courts is limited by existing legal material at their command. They find the material and shape it. The legislature may manufacture entirely new material'[11].

This is approximately true, the difficulty being the sense in which a judge may be thought to use 'existing legal material' when he decides a case purely out of a sense of justice. If Allen's expression refers to any source of inspiration for a decision, natural law for example, the proposition is true, but then Blackstone's orthodoxy would be equally true. If, on the other hand, it connotes only existing material labelled 'English law', it is untrue, for the judge is not, in the situation envisaged, using such material. Such cases may be rare, but that does not alter the fact that the judge does here legislate.

It is true also that the legislature may make entirely new material. It often happens, of course, that a statute only shapes existing material, as when it codifies; and besides, even new material has a better chance of success if it keeps within the spirit of existing material[12]. A semantic point is involved in the word 'make'. One can 'make' logs out of a tree trunk, but the material of wood is already 'there'; and this seems to be the idea behind Allen's statement. The weakness of his position is that there are times when judges do make new material. Perhaps, the distinction between statute and judge-made law may be put as follows. Every decision is concerned primarily with a specific set of facts, and the rule for which it is then quoted as a precedent is derived *from* the decision on the facts as stated. Statutes only seek to control the future (except for retrospective legislation) and accordingly deal with classes of facts. So statutes aim at laying down rules applicable *to* specific sets of facts as and when they arise. At the normative level, ie for future purposes, rules, whether created by precedents or statutes, operate alike. So, the distinction between statute and judge-made law does not lie in the bare fact that the former manufactures new material while the latter only shapes it, but in the manner in which and the degree to which they respectively resort to existing material or create wholly new material.

2. The bindingness of *stare decisis* operates up to a point. It means that a judge is bound to follow a precedent unless he can reasonably distinguish it.

11 *Law in the Making* p 310. See also Pound *Interpretations of Legal History* p 127; Cardozo *The Nature of the Judicial Process* p 166. Holmes J: 'I recognise without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions': *South Pacific Co v Jensen* 244 US 205 (1917); Lord Reid: 'If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation': *Myers v DPP* [1965] AC 1001 at 1021, [1964] 2 All ER 881 at 885 (this case has since been overruled by the Criminal Evidence Act 1965). He made a similar observation in *Pettitt v Pettitt* [1970] AC 777 at 794-795, [1969] 2 All ER 385 at 390.

12 Cf Savigny *On the Vocation of our Age for Legislation and Jurisprudence* (see ch 18 post).

Since distinguishing techniques are numerous, the element of bindingness is correspondingly limited.

3. Such discretion as judges have in handling precedents is guided by values, which concerns knowing the just way of applying the law to the facts. This will be dealt with in Chapter 10.

4. Legal thinking is *sui generis*. Its logic is instrumental and functional, and though precise, it is not mechanical. It is creative and purposive, but not haphazard.

5. The mechanics of the judicial process shows the genius of the common law in combining the need for certainty and the need to keep the law abreast of changing ideas and social conditions[13]. Certainty is preserved within the limits of rules and concepts; flexibility and adaptability are achieved through their interpretation and through the varieties of fact-statements.

6. Every decision pronounces on the legality or otherwise of conduct after it has been performed. This may seem hard on the litigant where a new rule or variation of a rule is enunciated, but it is the sort of imperfection that is unavoidable in a human institution such as this. The answer to any protest must be that the position cannot be otherwise, for it is beyond the wit of man to provide in advance for all contingencies. Besides, it would be true to say that in an immense number of situations the conduct of the persons concerned would not have been influenced even if the rule had been clear beforehand, while the value of having a rule for the future might be thought to outweigh any hardship that could occur by applying it retrospectively to the case in hand.

7. An unjust precedent is 'law' here and now, but this is sometimes too high a price for certainty in law. 'Certainty in law' said Maitland 'must not become certainty of injustice'[14]. Injustice is a factor that will in time either minimise its effect through distinguishing or bring about its demise through overruling. Neither is a satisfactory way of dealing with unjust precedents, since distinctions introduce needless complexity through exceptions, while overruling by higher authority or statute is slow and chancy. Should unjust precedents become numerous, then the future of *stare decisis* itself would be in jeopardy.

13 Lord Evershed: 'If it be said that your lordships are making new law, that is only because, whatever may have been the facts and circumstances reasonably to be contemplated a hundred years or more ago, at the present time it must be accepted ... that the ancient rules of the English common law have—and have as one of their notable virtues—the characteristic that in general they can never be said to be finally limited by definition but have rather the capacity of adaptation in accordance with the changing circumstances of succeeding ages': *Haley v London Electricity Board* [1965] AC 778 at 800-801, [1964] 3 All ER 185 at 194. Lord Reid: 'The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases': *Myers v DPP* (see p 163, n 11 ante).

14 Maitland *Collected Papers* III, pp 486-487.

READING LIST

A Aarnio *On Legal Reasoning.*
C K Allen *Law in the Making* (7th edn) chs 3-4.
B N Cardozo *The Nature of the Judicial Process.*
A R N Cross *Precedent in English Law* (3rd edn).
J Dewey *How We Think* ch 8.
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